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FIXING THE WAR POWERS

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinion and conclusions expressed herein are those of the author  
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Army, or any other governmental agency

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## FIXING THE WAR POWERS

by Major Michael P. Kelly

ABSTRACT: The framers created a model for the war powers when they drafted the United States Constitution. The model has not been followed. The practice of presidents has largely replaced the text. Presidents have come to wield the bulk of the national war powers. The War Powers Resolution (1973) was Congress's first attempt to reassert its right to participate in warmaking. The War Powers Resolution failed. This thesis argues that the War Powers Resolution should be repealed and replaced with either a law or informal power sharing arrangement. In either case the effort must be cooperative or the replacement will fail also. This thesis builds a model for the war powers, based upon the "intent of the framers." It then proposes this model as the proper basis for a remedy.

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## I. INTRODUCTION

American society has largely recovered from the scars inflicted by the Vietnam War. Americans are finally speaking and writing openly and objectively about this painful chapter in American history. Shortly after this bitter war ended, Congress passed the War Powers Resolution (hereinafter WPR);<sup>1</sup> a law which cannot be fully understood apart from its historical backdrop. The WPR is a unique and enduring legacy of Vietnam and the besieged President who ended that war.

An express purpose of the WPR was to ensure the "collective judgement"<sup>2</sup> of both the executive and legislative branches with respect to the use of force. It was an apparent attempt to settle this constitutionally enigmatic area and forge a new war powers partnership. The WPR's numerous defects are still the object of lengthy, largely unproductive, legal debates. From an experiential standpoint, eighteen years have clearly documented the WPR's failure. The modus operandi of presidents persists--unilaterally deciding to use force and then executing

the operation--meanwhile Congress debates and resigns itself to a fait accompli. The constitutional imbalance deepens with each successive use of force. And instead of forging a partnership, the WPR has served to prevent healing of the cleavage between the two political branches.

The world has experienced dramatic, fundamental changes in the last two years. The only certainty appears to be that change will continue and occur more rapidly. America will probably attempt to maintain its leadership within this "new world order."<sup>3</sup> But before America accepts this momentous role, it ought to carefully consider the vitality of its own procedures for developing and executing national security policy, as well as foreign policy which is a broader yet totally interrelated area.<sup>4</sup> An honest examination reveals that deficiencies exist, especially with respect to the war powers. In a complex world of constant change and ambiguous threats, the political branches must be partners in a well defined, cooperative, and workable war powers arrangement.<sup>5</sup>

This thesis suggests that the proper way to fix America's war powers is to repeal the WPR immediately and return to the framers' conceptual model for the war

powers, but only to the extent that historic practice has ratified this model. The framers consciously constructed an extremely general model for the war powers based upon their historically limited perspective. They fully expected the specifics to be derived from practice. But they also expected a joint, cooperative exercise of the war powers, not exercise by one branch.

The framers' great political science experiment has been successful. They worked under tremendous time pressure.<sup>6</sup> They knew that they could not have the most efficient government possible, so instead they sculptured the best possible government which had a realistic chance of being ratified. They never expected their work to stand without amendment. They fully intended to create an adaptable government which could function in the context of an ever changing world.<sup>7</sup> As we shall see, their wisdom is still instructive and may provide the only sound basis for fixing the war powers.

## II. THE WAR POWERS RESOLUTION: WAS "COLLECTIVE JUDGEMENT" EFFECTIVELY RESTORED?

### A. THE WAR POWERS RESOLUTION SET WITHIN AN HISTORICAL CONTEXT

By the early 1970's, Congress's discontent with presidential usurpation of the war powers was several decades old. After the close of America's last declared war, World War II, the pattern of nearly total congressional deference to executive initiative began to dissolve. For years this discontent was largely individual rather than institutional, exemplified by the failed attempts to pass war powers legislation and check other executive powers over national security.<sup>8</sup> On 7 November 1973, Congress passed the WPR despite President Nixon's strongly protested veto.<sup>9</sup> At the time of passage this appeared to be a bold reassertion of Congress's constitutional war powers. In retrospect it is obvious that the WPR was the result of reactionary politics rather than constitutional principle.

As an institution Congress rarely commits strongly to any specific position. Passage of a law over an executive veto is rare. The WPR passed at a singular

moment in American history. American involvement in the very distasteful and unsuccessful Vietnam War was just ending, and America's chief executive was under siege. The concurrence of these unique historical forces gave Congress enough resolve to overcome its normal institutional inertia with respect to the war powers.

#### 1. NIXON'S WAR

By late 1968, most Americans had repudiated the Vietnam War.<sup>10</sup> Much of modern politics is driven by public opinion; not atypically, many of our legislators began trying to distance themselves from the increasingly unpopular conflict. President Nixon assisted Congress by stubbornly attempting to attain the unattainable: to force North Vietnamese Communists into a favorable peace arrangement without sufficient domestic support for effective military intervention.

Political realities played a role. The election of a Republican President in November of 1968 made the task easier for the majorities in Congress; the Democrats no longer had to choose between party loyalty and the public's increasingly clear mandate to terminate the conflict.<sup>11</sup> The public's short-term

memory helped other congressmen in their quest to transfer blame to the President. In 1964, Congress passed the Gulf of Tonkin resolution with only two dissenters in the Senate and none in the House. This resolution gave the President nearly total discretion to initiate war.<sup>12</sup> Now congressmen began to disclaim their earlier role in leading the nation into battle. They claimed that the Tonkin resolution was not a "declaration of war" and that it had not been intended to give such discretion to the President.<sup>13</sup> By 1973, they pointed to a power usurping President as the prime offender. With a relatively clear conscience, congressmen--especially new arrivals--could demand passage of war powers legislation to prevent future instances of unilateral presidential war-making.<sup>14</sup>

After taking office in 1969, President Nixon committed a series of political blunders with respect to Vietnam. The mistakes seem to stem from an over confidence in his ability to superimpose his will upon an increasingly contrary public and Congress. In April of 1970, when the public wanted and expected deescalation of the war, American forces invaded neutral Cambodia. This unexpected expansion of military operations exacerbated the tense domestic situation.<sup>15</sup> In February of 1971, the President

agreed to provide combat support activities for South Vietnam's unsuccessful invasion of Laos. This violated, or came very close to violating, prior congressional appropriation limitations.<sup>16</sup> By that summer publication of The Pentagon Papers<sup>17</sup> had begun. This work revealed how several administrations had withheld vital information about Vietnam from the public and congressional decision-makers.<sup>18</sup> And finally, President Nixon's contemptuous treatment of the Mansfield Amendment, which was the Senate's first attempt to end the war, helped to solidify congressional anti-war sentiments.<sup>19</sup> Thus President Nixon's defiant, almost arrogant, handling of the conflict in the face of known public dissent and waning congressional support sealed his fate. He became the necessary political "scapegoat." It was all too simple for Congress to convert the Vietnam War into "Nixon's war." <sup>20</sup>

## 2. THE BESIEGED PRESIDENCY: 1973

From the heights of an overwhelming reelection victory in November of 1972, startling revelations concerning Nixon's abuse of power and privilege led to a precipitous fall in public support throughout 1973.<sup>21</sup> The Watergate scandal led the presidential fall in

1973. Watergate was continuously in the news and therefore before the public. President Nixon's early denial of any involvement--then his attempts to suppress relevant information<sup>22</sup> and hamper the ever widening investigation--all undermined his credibility. The "Saturday Night Massacre" evinced his willingness to abuse presidential powers.<sup>23</sup> In July and August of 1973, the Senate Armed Services Committee heard testimony about the falsification of records to conceal secret bombings of Khmer in 1969 and early 1970.<sup>24</sup> President Nixon's alleged improprieties with respect to personal finances were also in the news. On 12 July 1973, the House's government operations subcommittee began investigating the use of federal funds on the President's private residences in Florida and California. Tax experts questioned the propriety of his tax returns for 1970 and 1971.<sup>25</sup> Properly or not, President Nixon was under tremendous personal and political siege when the WPR passed over his veto. He had abused presidential powers and tried to hide behind its privileges. The Nixon administration became the epitome of an "imperial Presidency."<sup>26</sup>

### 3. PASSAGE OF THE WAR POWERS RESOLUTION

Without the convergence of these extraordinary events, Congress would probably have failed to pass the WPR. Proposals for war power legislation had been discussed as early as 1970.<sup>27</sup> Both houses drafted bills, but fundamental differences in approach made them virtually irreconcilable. The appointed conference committee failed to resolve the differences and these proposals died.<sup>28</sup> However by 1973, an increasingly unpopular President was rapidly becoming the epicenter of blame for an unpopular war. The unfolding saga of Nixon's "imperial Presidency" legitimized Congress's claim that the President had usurped the war powers. The WPR was touted as a law to prevent future Vietnam Wars and end presidential abuse.<sup>29</sup> Of course no one wanted anymore Vietnams; and no one wanted anymore imperial presidents. For a brief moment in history passage of the WPR became politically easy: to rectify constitutional imbalances and perhaps more importantly placate constituents. Moreover, the expendable Nixon would be forever tied to Vietnam and congressional distancing would be complete. The Ninety-third Congress seized the opportunity and, as will be discussed, passed an ill advised compromise

version of the war power bills.<sup>30</sup>

#### 4. CONCLUSIONS

Thus, a truly unique historical setting gave life to the WPR. An unpopular foreign war and a renegade President were the engines needed to generate sufficient political momentum and incentive in Congress, an institution normally indifferent with respect to war powers. Reactionary politics rarely produces good law. The WPR is a classic example of this.<sup>31</sup>

#### B. A CRITICAL EVALUATION OF THE WAR POWERS RESOLUTION

The WPR has been law for over eighteen years. Numerous scholars have presented views on and argued over the various constitutional and drafting deficiencies. No President has ever formally invoked the WPR without a degree of congressional coercion. Most administrations have barely acknowledged the WPR's existence.<sup>32</sup> Procedurally, it has never operated as Congress intended. In the wake of nearly every major military operation, Congress debates its constitutional role in the war powers arena. Amendments are periodically proposed, and then disposed of without

action. Except for a few indirect benefits which are difficult to quantify, the overwhelming weight of opinion is that the WPR has failed from both a legal and experiential standpoint.

1. EVALUATION FROM A LEGAL STANDPOINT

Professor Edward Corwin has stated that within the war powers arena, and more broadly all of foreign relations, the two political branches are constitutionally left with "an invitation to struggle."<sup>33</sup> If this is true, the WPR is ideally drafted to perpetuate this antagonistic contest. From a modern constitutional law perspective Professor Corwin is undoubtedly correct; however, the goal should be to facilitate cooperation, not struggle. The WPR does not create an effective, constitutionally based, cooperative partnership--this is ultimately why the WPR does not work.

a. THE WAR POWERS RESOLUTION'S ADVERSATIVE NATURE

The WPR represents a congressional attempt to forcefully reinsert itself into the process by which America exercises the war powers. There is no attempt to accommodate, the WPR is simply prescriptive in

nature. By passing the WPR, Congress necessarily presumed that it could constitutionally legislate the substantive policies and procedures governing America's war powers;<sup>34</sup> therefore, the WPR purports to bind the President. The WPR essentially mandates "collective" participation by requiring interactions at critical junctures in the process. For example, the WPR creates a process whereby the President "shall consult" with Congress before introducing forces into hostilities or imminent hostilities,<sup>35</sup> "shall consult regularly" thereafter until the forces are safe,<sup>36</sup> "shall submit ... a report" to Congress "within 48 hours" of introducing forces that includes certain information,<sup>37</sup> "shall ... report" certain information periodically throughout the deployment,<sup>38</sup> and "shall provide" other congressionally requested information.<sup>39</sup> Construed as a whole, and considering its prescriptive nature, the WPR's tenor is clearly adversative. In a sense, the WPR establishes procedures for the executive and legislative branch to deal with each other at arms length.

The WPR effectively blocks development of a more cooperative process. This is the natural result of its prescriptive nature and adversative tone. Though presidents rarely acknowledge its existence, the WPR

causes, if anything, presidents to be less cooperative with Congress for fear that any cooperation could be read as acquiescence to Congress's war powers. Since prior practices form the basis for most of the President's war power,<sup>40</sup> chief executives carefully avoid any adverse practice which could bind future administrations. Under the WPR presidents methodically avoid formal compliance with the WPR by exploiting its arguably unconstitutional and unartfully drafted provisions. Even more dangerous is executive branch recourse to "covert" operations, or use of surrogate entities as instruments of force as typified in the Iran-Contra affair.<sup>41</sup> Hopefully Vietnam taught America that it is very dangerous to have an executive branch which unilaterally and "covertly" develops and executes its own national security policies. In this respect, because the WPR did not forge a partnership between the coordinate political branches, it tempts the executive to take secretive, unilateral actions. Mutual distrust and secrecy are not conducive to cooperation and true partnership.

b. CRITICAL OPERATIVE PROVISIONS WHICH ARE ARGUABLY UNCONSTITUTIONAL

Doubtful constitutionality of most law is not as

problematic as it is with respect to the WPR. The adversative nature exacerbates the slightest issue of constitutionality. Presidents have repeatedly resolved all doubt in favor of noncompliance.<sup>42</sup> Moreover, the courts have repeatedly abdicated their judicial review<sup>43</sup> function in this arena. Thus the constitutionality of the WPR is of particular importance to its effectiveness.

No court has ever pronounced the WPR--or any provision within the WPR--unconstitutional, except in one notable instance.<sup>44</sup> Scholars continue to debate the constitutionality of various provisions, and generally there are plausible arguments on both sides of the issue. Congress understood that portions of the WPR were arguably unconstitutional. Inclusion of section nine,<sup>45</sup> the "Separability Clause," reflects their intent to save as much as possible, if a court found constitutional defects. Since the WPR's constitutional problems are only tangentially related to this thesis the following discussion merely summarizes the more serious problems and provides an index to other works of interest.

(1) SECTION 2: PURPOSE AND POLICY

Whatever may have been the original intent for this section was lost in the process of compromising the two different approaches to the WPR. The Senate's version had consistently tried to circumscribe the independent authority of the President to introduce American forces into combat or imminent combat.<sup>46</sup> Much of the Senate's language survived the process of compromise; therefore, section 2 appears to set limits on the President's war powers.<sup>47</sup> To the extent that this section attempts to define and limit presidential power it is arguably unconstitutional.<sup>48</sup>

However, section 2 is probably not an operative, binding provision. Section 2(c) omits certain well established powers of the Commander-in-Chief.<sup>49</sup> Even Senator Jacob Javits (a co-sponsor of the Senate's version), who asserted that section 2(c) remained an operative provision in 1973, acknowledged that the subsection was constitutionally flawed during a panel discussion in 1984.<sup>50</sup> Such obvious omissions undercut this provision's constitutional credibility. Moreover, section 8(d) clearly states that "Nothing in this joint resolution-- (1) is intended to alter the constitutional authority of the Congress or of the President ... ." This statement serves to further obscure the purpose behind section 2(c).<sup>51</sup> Apparently

in recognition of these problems, the conference committee consciously placed the provision in the "policy and purpose" section of the compromised bill. Pursuant to the principles of statutory construction, such sections contain precatory, not substantively operative provisions.<sup>52</sup>

(2) SECTIONS 3 AND 4(C): CONSULTATION AND CONTINUOUS REPORTING

In addition to serious drafting ambiguities, section 3 which requires prior and continuous consultation<sup>53</sup> is at least partially unconstitutional. To the extent that the President introduces forces into hostilities or imminent hostilities pursuant to his own independent powers as the Commander-in-Chief, consultation and reporting is arguably beyond congressional authority to mandate.<sup>54</sup> The same can be said for section 4(c)<sup>55</sup> which requires the President to periodically report specific information to Congress. Clearly a wise President will consult and report to Congress, but such acts are likely to be on his terms. So far, all presidents have considered these provisions arguably unconstitutional and have refused to strictly comply.

(3) SECTION 4(B): DELIVERY OF INFORMATION TO CONGRESS

Given the firmly entrenched doctrine of "executive privilege,"<sup>56</sup> this provision is also arguably unconstitutional. Executive privilege is particularly strong within the context of national security.<sup>57</sup> Congress is simply at the mercy of executive discretion with respect to the information contemplated by this provision in the WPR. Moreover, the courts are unlikely to resolve any contest over such military information.

(4) SECTIONS 5(B) AND 5(C): THE TERMINATORS

These provisions are more clearly unconstitutional than those previously discussed. Section 5 of the WPR establishes two ways for Congress to force the President to terminate American involvement:

(1) failure to affirmatively authorize the use within sixty<sup>58</sup> days;<sup>59</sup> or, (2) passage of a concurrent resolution at any time.<sup>60</sup> With respect to the first method, a law which purports to require automatic termination of a military operation at an arbitrary point in the future without requiring Congress to affirmatively act is almost certainly unconstitutional. Professor Michael Glennon noted that section 5 was at

the heart of the WPR methodology, since it had the effect of saving Congress from institutional inertia.<sup>61</sup> The automatic nature of the first terminator is undoubtedly the very feature which renders the provision unconstitutional. As written, section 5(b) operates in derogation of the express constitutional power of the President to control on-going military operations. With respect to the second method, the United States Supreme Court actually spoke in INS v. Chadha.<sup>62</sup> The Court held that legislative veto provisions, similar to the WPR's concurrent resolution provision,<sup>63</sup> are unconstitutional.

#### (5) CONCLUSION

Since all of the critical operative provisions of the WPR are arguably unconstitutional, it is fair to ask if the law has any legal affect at all. If experience under the WPR is any indication of legal efficacy, the only possible conclusion is that the WPR is "dead letter."

### 2. EVALUATION FROM AN EXPERIENTIAL STANDPOINT

#### a. ABYSMAL RECORD

Experience has proven the WPR ineffective in two important respects. First, the WPR is a failure when evaluated in terms of the amount of "collective judgement" it restored. This consultive aspect was key to the WPR because Congress perceived that presidents habitually presented fait accomplis for their approval. Experience has shown that "consultation," whatever the term was supposed to mean,<sup>64</sup> often occurs after the use of force or initiation of the military operation. When consultation actually occurs prior to the use of force, it has consistently taken the form of mere notification of the executive's course of action.<sup>65</sup> Meaningful collective judgement has not been restored under the WPR.

Second, the WPR's methodology has never worked properly. The WPR incorporated a "self-activating mechanism"<sup>66</sup> to be triggered by the President's "48 hour report" required in section 4(a).<sup>67</sup> The wording was ambiguous, and needless to say no President ever voluntarily triggered the mechanism by reporting properly. Most presidential reports state that they are "consistent with" the WPR, but cite no specific provision.<sup>68</sup>

Normally any compliance, even partial compliance,

has been in response to congressional pressuring. Unfortunately Congress as a whole seldom rallies itself to the task of enforcement.<sup>69</sup> Contrary to what some congressmen claimed, operations Desert Shield and Storm are the most recent examples of the WPR's failure to meaningfully involve Congress in war-making.<sup>70</sup> It is difficult to build a record of success when circumvention proves so easy.<sup>71</sup> Considering its adversative nature, presidents exploit every possible drafting ambiguity in avoiding the WPR and its intended methodology.

b. A FEW "SUCSESSES"?

A few scholars have found salutary aspects in the WPR, but most of these favorable comments are from early writers.<sup>72</sup> Some have said that it has spurred open debate on the issues, thereby educating the public. Unfortunately the debate has normally focused on the WPR and not the wisdom of the foreign policy or national security decisions.<sup>73</sup> Some have said that the WPR provides Congress with some control over an otherwise unshackled President. For example, both Presidents Reagan and Bush extended some formal recognition to the WPR to achieve their objectives in Lebanon and South West Asia respectively. One early

writer believed that if the WPR produced any prior consultation or notification, this would be helpful.<sup>74</sup> Others have stated that the WPR's existence causes presidents to structure national security decisions more carefully.<sup>75</sup> In almost every case, quantifying such success is extremely difficult. Many of these salutary actions would have probably occurred without the WPR. Generally speaking the "successes" of the WPR are more illusory than real.

c. CONGRESSIONAL ENFORCEMENT OF THE WPR

If Congress really meant to regain a meaningful role in the war powers arena, their timidity with respect to invoking and enforcing the WPR has not been indicative of such resolve. Granted, Congress intended the WPR to be largely automatic and "to control presidential discretion in the event Congress lacked the backbone to do so."<sup>76</sup> But Congress has not met aggressive presidential avoidance with aggressiveness, at least as an institution. There appears to have been a gross overestimation of Congress's political will with respect to sharing the war powers. On a more fundamental level, Congress overestimated its institutional capabilities with respect to the war powers.<sup>77</sup> The WPR resulted from singularly unique

historical forces. Today's Congress appears institutionally incapable of sharing the war powers to the extent envisioned by the framers.<sup>78</sup>

### 3. CONCLUSIONS

From a legal and experiential standpoint, the WPR is a failure. Should something be done or is the existing arrangement working adequately? Can anything be done or is every war powers legislation likely to suffer the same fate as the WPR? The remainder of this thesis is devoted to addressing these important issues. The WPR's failure is instructive, and there are two important lessons which should not be lost to time.

First, any legislation which maintains an adversative nature will probably fail. The war powers arena is a constitutional "twilight zone"<sup>79</sup> and the court's abdication means that few of the constitutional issues will ever be settled definitely-except perhaps unintentionally by way of a collateral adjudications such as in INS v. Chadha.<sup>80</sup> It is time to explore alternatives to legislation such as "constitutional understandings."<sup>81</sup> Once the political branches achieve a cooperative, accommodative consensus, then Congress can consider enacting a "legal" fix.

Second, the political branches must come to some basic agreement about what the framers intended. The second lesson is really a prerequisite to the first since it must happen before any cooperative, accommodative consensus is possible. The war powers arena has engendered endless constitutional debate. As previously discussed, the doubtful constitutionality of the WPR has fueled continuing political branch conflict and presidential circumvention of the WPR. As will be discussed the intent of the framers is illusive, but discernable by using better methodologies. Although the framers' intent cannot be known with absolute certainty, such is not required. It is sufficient if the political branches can agree, thereby providing a common ground and an essential point of departure for any effective fix. So, what was the original intent of the framers?

### III. CONSTRUCTING A CONCEPTUAL MODEL FOR THE WAR POWERS: IS THERE ANY SUBSTANCE WITHIN THE "ZONE OF TWILIGHT?"<sup>82</sup>

#### A. THE ILLUSIVE "INTENT OF THE FRAMERS"

##### 1. INTRODUCTION

Within the war powers arena scholarly adversaries have been beating each other with the "intent of the framers" for years. Because scholars apparently use this phrase in different ways, a clear definition for use in this thesis is necessary. Stated simply, looking for the "intent of the framers" is an attempt to discover the meaning which the drafters gave to the text. Under this definition, the "intent of the framers" does not go beyond the text, though a thorough researcher should carefully consult all available materials in the quest for textual meaning. Declaring that the framers intended anything beyond the text is extrapolation. Extrapolation is obviously necessary because the text is often insufficient with respect to specificity and breadth of coverage, but the two concepts must be kept distinct. The two concepts are, however, interrelated. Discovering the "intent of the framers" consists of reconstructing the original conceptual models held by the framers and manifested in the text. Subsequently, these models provide the foundation and set parameters for necessary extrapolations.<sup>83</sup>

When analyzing the war powers, scholars need to clearly differentiate between the "intent of the

framers" which represents what was--an historical question--and subsequent extrapolation which tends to represent what should be--a normative question. Which came first? Obviously the original conceptual models came first, and extrapolation builds on these models. But some scholars try to develop the original models by primarily citing subsequent extrapolations for support. They refer to these extrapolations as contemporaneous constructions or practices.<sup>84</sup> This is a dangerous methodology.

Some scholars add confusion to their analysis by introducing normative arguments. Extrapolations may be consistent with the "intent of the framers," but they need not be if the original models have become unworkable due to the ever changing world. The framers were not adverse to breaking with traditional thought, experimenting with hybrid governmental forms, or allowing "experience" to become the basis for change.<sup>85</sup> Consequently, our Constitution provides a formal amendment procedure, and the original models are usually general enough to accommodate informal modification. Discovering original intent involves careful analysis of the text and the historical context. It should not involve attempts to justify what should be. Scholars must take the text as they

find it. Once they develop the original models, then they can rationally decide if these models are workable in a modern context, or whether they need to be changed. Consciously deciding to formally amend or informally modify the Constitution because the original models have failed is a separate issue altogether. Scholars must always keep this in mind.

In the areas of foreign relations and the war powers historical practice has had a powerful influence because the Constitution leaves so much to extrapolation. In fact practice has arguably served as an extra-constitutional text in these two areas, however, most would agree that there are limits to this process. If practice becomes a means to amend or modify the Constitution inconsistently with the original model, then there is a constitutional problem. America should not allow the Constitution to become a self-amending document based upon gradual extrapolation, otherwise America's claim of constitutional government becomes a myth. In simple terms this is the essence of the war powers dispute. Has practice taken us too far? To know the answer one needs to return to the Constitution to discover the "intent of the framers."

## 2. THE PROBLEM

The threshold issue is whether the "intent of the framers" can be discovered with sufficient certainty to construct a useful conceptual model. There are three major obstacles to this discovery process: first, the record is inadequate; second, the framers used procedures which make it difficult to discern the common intent; and third, the framers used vague and general words to manifest their intent. Given these significant obstacles, it is easy to see why scholars differ so greatly. The key is in the methodology. Obviously it is impossible to eliminate all uncertainty, but the chosen methodology should reduce uncertainty with respect to these three obstacles.

## 3. THE METHODOLOGY

### a. THE INADEQUATE RECORD

Working with an inadequate record is the challenge of all historians. To reconstruct any historical event acceptance of some uncertainty is necessary because it is normally impossible to develop better records.<sup>86</sup> With respect to the Constitution this challenge is

acute since the Federal Convention which yielded this document was closed to the public, and there are only two complete records of the Convention.<sup>87</sup> The records which exist are often incomplete and confusing.<sup>88</sup> Thorough, comprehensive research from original sources reduces the uncertainty with respect to this obstacle. All relevant information should be analyzed and interpreted consistently. So much has been written on the war powers that over reliance on anything other than original sources introduces the danger of using information which has been interpreted and reinterpreted by several layers of scholars. Finally, certain areas of the Constitution such as the war powers receive scant treatment both textually and in the Convention's debates. Where the available information is thin, the meager text must be interpreted contextually: in light of the whole document.

The methodology used in this thesis minimizes uncertainty by intensively examining the war powers text using original sources. Next, it confirms and expands the meaning by resorting to other interpretive aids: consideration of the logical consistency between the express grants and interpretation in light of the Constitution as a whole.

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b. THE PROBLEMATIC PROCEDURES

The procedures used by the framers make it questionable to say that there ever was any precise common intent.<sup>89</sup> Approximately fifty-five men<sup>90</sup> with widely divergent views drafted the Constitution.<sup>91</sup> The extent of any delegate's influence will never be known with certainty, although it is fair to say that specific framers, such as James Madison, had more impact than others.<sup>92</sup> No single man, or group of men, had sufficient influence to say that their view was pervasive. The entire process was one of grand proposals, debate, negotiation, compromise, drafting, more debate, more negotiation, more compromise, and eventually the casting of votes.<sup>93</sup> The official record which reflects divided votes on various motions demonstrates the lack of unanimity. Even those framers who voted together may have held differing shades of meaning for the text. But the final text reflects the majority's will and vote which constitutes common intent in a democracy. Thus, reliance on the text as a foundation for the extrinsic materials reduces the risk of uncertainty with respect to this obstacle. The framers' potentially divergent views complicate all attempts to accurately interpret and use

contemporaneous construction to provide textual meaning.<sup>94</sup> More is not necessarily better with respect to extrinsic materials which can serve to confuse rather than clarify meaning. Scholars must carefully limit the scope of extrinsic materials considered, must carefully evaluate their evidentiary value, and ascribe an appropriate weight. The key concept is that the text must be preeminent.

The methodology used in this thesis minimizes uncertainty by primarily focusing upon the text and intrinsic analysis. Secondly, the methodology turns to extrinsic materials, but only as they confirm and give full meaning to the text. Finally, although this thesis considers a broad range of extrinsic materials, an evaluation of their evidentiary value precedes each consideration.

#### c. DELIBERATELY VAGUE AND GENERAL

The Constitution is a "blueprint" for national government.<sup>95</sup> So the framers intentionally crafted a document suited for such a task.<sup>96</sup> The two essential characteristics were: first, the document required inherent elasticity to provide for the innumerable specific situations which could never be addressed in

detail; and second, the document required inherent flexibility so that it could be adapted to the ever changing context.<sup>97</sup> The framers focused on general principles, not specific details. They designed their conceptual models to provide guidelines for the subsequent development of specific details. There is clearly an enormous amount of detail intentionally missing which is left for extrapolation. This reality frustrates some scholars, others regard this deliberate ambiguity as exploitable. The latter become dangerous if they indiscriminately try to extract detailed textual meaning from extrinsic materials of doubtful evidentiary value. Acceptance of this situation and concentration on developing a carefully researched, yet very general model, reduces the risk of uncertainty with respect to this obstacle.

The methodology used in this thesis minimizes uncertainty by accepting the fact that any conceptual model will be very general and deal only with guiding principles. As such, there will be no attempt to build a highly detailed, comprehensive model for the war powers by citing vast amounts of questionable extrinsic materials. Ascribing such detail to the "intent of the framers" is just as erroneous as denying that a conceptual model for the war powers exists.

Printer Malfunction  
No Text Missing

## B. CONSTRUCTING THE ORIGINAL CONCEPTUAL MODEL FOR THE WAR POWER

### 1. OVERVIEW OF THE PROCESS

The primary focus is upon the text of the Constitution and related intrinsic analysis. The three areas of inquiry will be: the relevant text, its logical consistency, and its consistency within the document as a whole. The secondary focus is upon the extrinsic materials, such as historical antecedents and contemporaneous construction, as it serves to provide meaning to the text. Though the primary focus is upon the intrinsic materials, this discussion will flow chronologically. It begins with the historical antecedents which are extrinsic, then moves to the text which represents the intrinsic materials, and concludes with the ratification process materials and contemporaneous construction which are additional extrinsics.

### 2. EXTRINSIC MATERIALS: HISTORICAL ANTECEDENTS

Historical antecedents can be divided into two categories: the framers' intellectual foundations and

the framers' experiential backgrounds. The tough issues involve determining how much affect each of these antecedents had on the resultant text. This is simply another way of asking how much evidentiary weight to ascribe each of these extrinsic materials. The difficulties in resolving these issues are numerous, and the level of uncertainty is high. An honest researcher is unable to draw very many conclusions concerning the effects of these antecedents without becoming speculative.

a. INTELLECTUAL FOUNDATIONS: WHAT WAS IN THEIR MINDS?

One cannot ignore a preliminary consideration; the framers were products of the Age of Enlightenment.<sup>98</sup> They considered their task a grand experiment in political science, and they unashamedly approached it that way.<sup>99</sup> Whether they recognized it or not, their approach somewhat resembled the scientific method which was an outgrowth of their age. For their experimentation and observations they drew upon history, both ancient and their own recent experiences. They also consulted contemporary political thinkers who had begun deriving theories to govern political science.<sup>100</sup> The framers considered what would work in a nation like America in light of historical experiences

and emerging theories. Through debate and compromise, the framers produced rational solutions which they thought would work. This led to a unique governmental form. They did their best and left the rest for the nation to correct based upon subsequent experiences under the new Constitution.<sup>101</sup>

With respect to the specifics of their intellectual foundation, there are several intractable issues. Which sources made up this foundation? Which ideas were actually incorporated in to the text? To what extent were these ideas adopted without modification?

With respect to potential sources, it is difficult to identify the specific sources which were known to, and read by, the framers as a whole.<sup>102</sup> Fortunately the framers lived when the curriculum for formal education was limited and works dealing with political science were even more limited. The delegates to the Federal Convention were generally well educated for their day.<sup>103</sup> They probably studied the Greek and Roman classics which would have provided helpful case studies on democratic and republican forms of government.<sup>104</sup> In fact, the framers often cited examples from ancient Greece and Rome to bolster their arguments during

debates and in their writings.<sup>105</sup> Many would have studied Sir William Blackstone,<sup>106</sup> John Locke,<sup>107</sup> and Montesquieu.<sup>108</sup> Each of these men wrote important and popular works on the theory and practice of law and government. Outside of these sources, one must speculate.

With respect to which ideas the framers adopted and in what form, resolution is even more difficult. The framers expressly adopted certain ideas and rejected others. For example, the framers expressly adopted such broad ideas as the separation of powers, systemic checks and balances, and republicanism; but they modified nearly every idea.<sup>109</sup> Unfortunately most ideas fall somewhere on a continuum of uncertainty between the two extremes: express adoption and express rejection. One thing is certain, the framers were innovators, they did not "blindly" follow any particular idea on government. As James Madison admitted in The Federalist Papers:

[the framers] paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names to

overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience.<sup>110</sup>

The challenge of reconstructing the framers' intellectual foundations is laden with uncertainty. Outside of a few expressly adopted ideas, specific conclusions about how the framers' intellectual foundations affected the text are speculative.<sup>111</sup> To reduce uncertainty, conclusions about the effects of the framers' intellectual foundations must be considered in light of their experiential backgrounds. Ideas from the former were used as the tools to fix defects revealed by the latter.

b. EXPERIENTIAL BACKGROUNDS: WHAT WAS ON THEIR MIND?

(1) British Heritage

A vast majority of the framers had a British cultural background. As such, they knew of the historical power struggles between the Monarch and Parliament. They knew of the general trend during the 17th and 18th centuries for Parliament to gain power at the expense of the Monarch;<sup>112</sup> but they undoubtedly remembered the period when the Monarch exercised the

war powers (and the foreign relations powers) pursuant to "royal prerogative."<sup>113</sup> Under that system the Monarch could decide to make war and then execute the decision. Even the influential Locke, who venerated limited government under law, supported the concept of prerogative. Locke coined the term "federative" power<sup>114</sup> which included many of the powers associated with prerogative. In Locke's methodology, this "federative" power was an executive function.<sup>115</sup> Although our framers adopted much from their British heritage,<sup>116</sup> and Locke, they considered prerogative a defect and rejected the concept.<sup>117</sup> British history reflected abuse of the war powers by monarchs armed with prerogative. The framers consciously determined to avoid such abuse<sup>118</sup>--even at the expense of accepting a less efficient government.<sup>119</sup> As pragmatists, the framers probably realized that the states would reject a unitary executive which resembled a monarchical form too closely.

## (2) COLONIAL EXPERIENCES WITH THE HOMELAND

The relationship between Britain and her American colonies deteriorated steadily from 1760 until the Revolutionary War.<sup>120</sup> The colonist felt betrayed by their homeland--both economically and politically. The

taxation without consent was oppressive. Britain's repeated interference with colonial legislatures and individual liberties was intolerable. Correct or not, the colonists directed much of their acrimony towards the Monarch.<sup>121</sup> The Declaration of Independence reads like a multiple count indictment against the Monarch's "repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these states."<sup>122</sup> Particularly odious was the Monarch's stationing of British and foreign mercenaries in the colonies to enforce his repressive policies.<sup>123</sup> The framers did not forget the revolutionary, antimonarchical fervor which peaked in 1775-1776, nor did they forget the Monarch's abuse of the war powers. Professor Corwin states:

The colonial period ended with the belief prevalent that 'the executive magistracy' was the natural enemy, the legislative assembly the natural friend of liberty, a sentiment strengthened by the contemporary spectacle of George III's domination of Parliament.<sup>124</sup>

Monarchical abuse of power was the British government's failure which the framers sought to remedy. However,

they balanced these bitter memories against their even more recent experiences with the ineffectiveness of governments lacking an executive.

### (3) EARLY INDEPENDENCE AND STATE GOVERNANCE

The new independent states rejected the British monarchical form. Unfortunately this broad based, popular rejection led to a gross overreaction as manifested in the form of governments adopted by the respective states.<sup>125</sup> Several hastily drawn state constitutions completely rejected the British concept of a balanced government: "separation of powers" amongst various branches in government and creation of a system of counterpoised "checks and balances." The legislatures or assemblies in most states became the dominant, if not sole, branch in government.<sup>126</sup> By 1787, legislative abuse of power was so egregious and the failure so complete that the framers knew they must resurrect the concept of balanced government.<sup>127</sup>

### (4) GOVERNING UNDER THE ARTICLES OF CONFEDERATION: 1781-1788

Governance under the Articles of Confederation was nearly impossible. Repudiation of the monarchical form

had carried over into national government. There was no executive, only a feeble Continental Congress. Tyrannical rule by this legislative body was not a problem since the national government wielded so little power. This situation led to enumerable domestic and foreign problems.<sup>128</sup> The lack of an executive proved especially troublesome in the conduct of foreign relations and military operations.<sup>129</sup> The framers went to Philadelphia amend the Articles, but the problems were so numerous and fundamental that the delegates decided to create and propose a radically new government.

Experience taught the framers another important lesson during this period: the war powers needed fixing to guarantee effective common defense. Beginning with the Revolutionary War, Continental Congress's best attempts to make war were essentially failures. Congress had the good sense to appoint General George Washington as Commander-in-Chief, but they immediately restricted his freedom of action by trying to manage the Army and military operations. This arrangement failed miserably and Congress gradually surrendered their powers to the field commander.<sup>130</sup> After the Revolutionary War, there were occasional threats to the nations. There was a continuing need to deal

effectively deal with Indians on the frontiers and insurrections at home.<sup>131</sup> European colonies surrounded the new nation and posed a continuous threat. After experiencing near disaster under the Articles, the framers knew they must assign control of military operations to a chief executive.<sup>132</sup>

#### c. CONCLUSIONS

The precise effect of historical antecedents on the actual text is difficult, if not impossible, to assess. The framers went to Philadelphia armed with a vast assortment of ideas and theories concerning how to construct an effective government that would still preserve individual liberties. The framers also went to address a host of problems which experience had revealed. They drew upon the experiences of other societies throughout history and scrutinized their own unique, American experiences. Fixing the war powers was only one of many challenges, and it did not occupy much of their time. The framers probably thought they had a fairly simple, rational fix.

The historical antecedents appear to have had three traceable affects upon the framers' unique solution to the war powers problem. First, experience

had taught that the new government needed an executive of some sort. Theorists agreed that the full war powers were an executive function, but the concept of an executive with prerogative was unacceptable. Therefore, the war powers had to be divided between the two political branches. Second, the framers' affinity for legislative dominance, and suspicion of executive power, mandated assignment of the awesome decision to declare war to Congress. The executive was left with the power to control war which required the executive's strength and unity. Third, such a divided arrangement comported with the perceived need to resurrect balanced government where neither branch could abuse the war powers.

### 3. INTRINSIC MATERIALS

Conclusions about the meaning of the Constitution based solely on historical antecedents are speculative. As discussed, there are many intractable issues and the level of uncertainty is high. Antecedents provide a critical backdrop which supplies wider meaning to the text and enhances understanding. Historical antecedents set the stage for the text, but nothing more. The text provides the most important materials.

The document represents the ultimate product which flowed from the framers' after they considered the antecedents. The words reflect, though often imperfectly, the true "intent of the framers" which was forever fixed in time. Madison once wrote:

In order to understand the true character of the [C]onstitution of the United States, the error, not uncommon, must be avoided, of viewing it through the medium [of another governmental form], whilst it is ... a mixture of both. And having no model, the similitude and analogies applicable to other systems of government, it must, more than any other, be its own interpreter according to its text ... <sup>133</sup>

As Madison points out, since America's Constitution is unique, focusing on the text is the key to unlocking its true meaning.

a. THE TEXT AND WHAT IT MEANT

The Constitution does not have very much to say

about the war powers. The Convention debates pertaining to these provisions are also short and sometimes confusing. The only express war powers provisions empower the Congress to "declare War, grant Letter of Marque and Reprisal, and make Rules concerning Captures on Land and Water";<sup>134</sup> the President is made the "Commander-in-Chief."<sup>135</sup> The paucity of text to control such an important and increasingly complex arena as the war powers may explain the extensive, and often confusing, resort to extrinsic materials. The framers did not face these complexities in 1787.<sup>136</sup> They undoubtedly thought their treatment was simple, yet sufficient.<sup>137</sup>

(1) CONGRESS: THE DECISIONAL<sup>138</sup> WAR POWERS

What did the framers mean when they assigned three express war powers to Congress? As with other legal documents, constitutional interpretation should conform to accepted canons of construction. One important canon is the literal interpretation rule.<sup>139</sup> In his commentary on the constitution, Professor Joseph Story states: "The first and fundamental rule in the interpretation of all instruments is to construe them according to the sense of the terms, and the intention of the parties."<sup>140</sup> Applying an historical meaning to

the critical terms--as the framers would have understood them--is essential.

"Declaring" war had a much broader connotation than some scholars give it. Formal declarations of war were clearly understood by the framers; though they were nearly obsolete even in 1787.<sup>141</sup> To interpret this grant as merely giving Congress the power to formally declare war is unduly restrictive.<sup>142</sup> Such a construction violates the rule of interpretation which requires maximum effect for each term and rejects constructions which defeat the term's apparent purpose.<sup>143</sup> Such a construction ignores that the framers had created an adaptable document,<sup>144</sup> not one which would rapidly become obsolete as mere terminology changed. Looking at contemporary usage, the framers often used "declare war" interchangeably with terms like "authorize or begin" war,<sup>145</sup> "authority to make war,"<sup>146</sup> and "determining on ... war."<sup>147</sup> Correctly interpreted, this first grant gives Congress the exclusive and plenary power to authorize war.<sup>148</sup> By clear implication, the President's war powers were subject to Congress's war powers.<sup>149</sup>

Some scholars have found the term "war" problematic since warfare has evolved so radically

since 1787.<sup>150</sup> Use of the term "Cold War" would have left the framers baffled. Some scholars suggest that this grant only governs full-scale uses of force or "perfect" wars, to use the 18th Century term.<sup>151</sup> Then they imply or conclude that lesser uses of force, short of war, are solely or primarily within presidential control.<sup>152</sup> Once again, such a restrictive construction violates the rules of interpretation and ignores the framers' adaptable document objective. Moreover, in the framers' vernacular "war" meant all "contest[s] between nations or states, carried on by force."<sup>153</sup> When read in conjunction with the next grant, it is clear that the framers intended to assign Congress the power to authorize all uses of forces, except in one instance.<sup>154</sup> The framers apparently understood that lesser uses of force could lead to "perfect war."<sup>155</sup> Perhaps the framers anticipated the day when there would be no clear delineation between war and lesser uses of force.<sup>156</sup>

Discussion of the war powers often overlooks the next grant of power dealing with letters of marque and reprisal. Professor Henkin has commented, "This power is dead."<sup>157</sup> It is "dead" only in the sense that Congress no longer grants such letters; however, the grant has interpretive value. The framers were

familiar with these letters which essentially authorized Americans to commit acts of war against the subjects of other nations.<sup>158</sup> Governments issued these letters primarily to ship captains who acted as official pirates for the state. This quaint practice was how nations waged limited naval wars in the late 1700's and took reprisal in redress for national grievances.<sup>159</sup> Though the Articles of Confederation<sup>160</sup> addressed these letters, in their first working draft the framers failed to mention them. Finally on 18 August, either Charles Pinckney or Elbridge Gerry (record unclear), proposed adding letters of marque and reprisal since they were somewhat different than the "power of war."<sup>161</sup> The Convention record does not reflect any dissent over granting this lesser war power to Congress. Apparently the framers agreed that the nation's legislature should control all these lesser uses of force.<sup>162</sup>

The final grant of power relates to the second. The framers gave Congress the power to formulate rules for military engagements and provide for the confiscation of foreign property (especially ships) as the prizes of limited warfare.<sup>163</sup> Consistent with the previous grants, the framers assigned Congress control over the nature of the nation's military operations.

Federal Convention discussions and debates about the war powers are few and relatively uneventful. The only significant moment with respect to Congress's war powers occurred on 17 August 1787, when the wording of the first draft was changed from "make war" to "declare war."<sup>164</sup>

The general Convention recessed on 26 July, to allow the Committee of Detail<sup>165</sup> to prepare a first draft of the Constitution. On 6 August, John Rutledge presented this draft which gave Congress the power "to make war."<sup>166</sup> The delegates then began discussing the draft clause-by-clause; they did not reach the war clause until 17 August. The record at this critical point is not good. Two framers presented alternative proposals which the delegates rejected.<sup>167</sup> James Madison and Elbridge Gerry then moved "to insert declare, striking out make war; leaving to the Executive the power to repel sudden attacks."<sup>168</sup> Sometime during the ensuing discussion, Rufus King stated that "'make' war might be understood to 'conduct' it which was an Executive function."<sup>169</sup> The records contain no further discussion on this point. The affect of King's stray comment is uncertain because the two available records diverge. King may have

changed one inconsequential vote or several votes resulting in passage of Madison's motion after it had failed initially. Ultimately, the motion passed at least partly or wholly for reason stated by Madison and Gerry, and partly or wholly for the reason stated by King. Either way, King's statement comports with the framers' view of the President's war powers. Despite the poor record, one may fairly conclude that this celebrated change reflects the framers' intent to empower the President to repel sudden enemy attacks<sup>170</sup> and conduct military operations, the latter being embodied in the Commander-in-Chief clause.

From the three express grants and the debate on 17 August 1787, the inevitable conclusion is that the framers entrusted Congress with the decisional war powers--the power to authorize any use of force and set parameters concerning the nature of that use, when deemed appropriate. Congress was not to control military operations once authorized. Finally, a very narrow exception allowed the Commander-in-Chief to forcibly repel sudden attacks without congressional authorization.

(2) THE PRESIDENT: THE OPERATIONAL<sup>171</sup> WAR POWERS

What did the framers mean by the Commander-in-Chief clause? The Constitution expressly assigns to our President power as the Commander-in-Chief.<sup>172</sup> The Convention's record shows that this was a relatively uncontroversial decision. Some scholars have called this more a title, than a power. Perhaps this is due to the anemic construction given to this term during the first seventy years under the Constitution.<sup>173</sup> But such a construction is inconsistent with the ideas expressed at the Convention; it is inconsistent with the ideas and lessons gleaned from historical antecedents;<sup>174</sup> and it is inconsistent with the framers' use of the term.<sup>175</sup>

During the early phases of the Federal Convention several framers submitted proposals that either designated the executive as Commander-in-Chief or gave him operational control over war. Notably the Virginia Plan, which evolved into our Constitution, did not initially address the executive's war powers.<sup>176</sup> Hamilton, who consistently advocated a strong executive,<sup>177</sup> proposed that the Senate "have the sole power of declaring war," and that the executive "have direction of the war when authorized or begun."<sup>178</sup> Charles Pinckney proposed a similar arrangement.<sup>179</sup> In the New Jersey Plan, William Patterson proposed a

"multiple executive"<sup>180</sup> to "direct all military operations."<sup>181</sup> Patterson's latter proposal triggered some debate. Neither Pierce Butler nor Elbridge Gerry believed that a multiple executive could effectively control military operations, implicitly recognizing the great need for unity of command, secrecy, speed, and decisiveness in such operations.<sup>182</sup>

The Commander-in-Chief clause originated with the Committee of Detail. With respect to the war powers, the Committee of the Whole<sup>183</sup> did not give any specific guidance to the Committee of Detail.<sup>184</sup> Based upon the source documents used by this latter committee,<sup>185</sup> it appears that the New Jersey Plan and Pinckney's proposals generated the final Commander-in-Chief clause. John Randolph prepared the earliest outline which contains a Commander-in-Chief clause; it read "[the executive powers shall be] to command and superintend the militia." John Rutledge, his boss, altered this outline and added the Commander-in-Chief clause which essentially appears in our Constitution.<sup>186</sup> Rutledge had previously expressed concern over vesting the powers of "war and peace" in the executive.<sup>187</sup> Unless he changed his mind, Rutledge certainly did not equate the powers of a Commander-in-Chief with the decisional war powers. Eventually the Committee of

Detail presented their draft which contained Rutledge's Commander-in-Chief clause.<sup>188</sup> The Committee of the Whole adopted this clause with little debate.<sup>189</sup> This is surprising since nearly every other proposed executive power piqued controversy. One logical explanation is that the framers commonly understood that the Commander-in-Chief power excluded Congress's weightier decisional war powers<sup>190</sup> and that a legislative body was incapable of controlling military operations.

Given the genesis of the Commander-in-Chief clause, nothing suggests that it assigns anything but the operational war powers. The framers simply meant for the Commander-in-Chief to furnish civilian headship for the military and control operations,<sup>191</sup> thereby exploiting the institutional advantages which only a unitary executive could provide.

b. LOGICAL CONSISTENCY BETWEEN THE EXPRESS GRANTS

The framers were obviously learned and sophisticated for their day. They understood their world, but of course they lived in a radically different era. The framers' apparent conceptual model was difficult to apply almost immediately.<sup>192</sup> Moreover,

the framers never directly addressed how their war powers partnership was to operate. Is it possible that in their haste to address more divisive issues they simply assigned the four grants of power and hoped for the best? Considering all of the war power grants together reveals an internally consistent and logical plan--if not an actual genius.

First, the model for the war powers comports with the framers' intellectual foundations. They divided the powers between two coordinate branches to prevent accumulation of power.<sup>193</sup> Then they formulated a somewhat unique and experimental<sup>194</sup> check by dividing the war powers along functional lines--decisional and operational. To exercise the power, the two political branches would have to cooperate. Thus the framers advanced their goal of resurrecting balanced government.

Second, the model for the war powers fits the framers' desire to match institutional strengths with specific functions.<sup>195</sup> By nature, the war power could be bifurcated along functional lines; the framers perceived the need for a policy level decision-maker and an energetic commander. From historical antecedents the framers knew that the legislative

branch would be a safe repository for decision-making of such great national importance,<sup>196</sup> and the executive branch would be the ideal executor. Thus the framers achieved their goal of an effective war powers at least from a functional perspective.

Third, the model for the war powers was politically acceptable to the public, therefore, it increased the Constitution's chances of ratification. The framers were pragmatists; they knew that the most efficient government they could create would probably be unacceptable.<sup>197</sup> Legislative domination of the executive by making the latter subject to the former's decisional power was necessary to secure ratification. Thus the framers developed an acceptable war power.

Finally, the model for the war powers divided power, but this division was along functional lines. The power was not originally concurrent or overlapping,<sup>198</sup> making competition for power each branches' destiny. Each branch had an assigned primary function within the partnership. At the fringes there would be overlap, but not enough to generate inter-branch warfare. Thus the framers did not originally send out "an invitation to struggle,"<sup>199</sup> but rather an invitation to cooperate in solving America's national

security problems.

c. CONSISTENCY BETWEEN THE WAR POWERS GRANTS AND THE  
CONSTITUTION AS A WHOLE

Considering the Constitution as a whole document is instructive since patterns of design and structure emerge. With respect to interpreting text, or text susceptible to more than one meaning, Professor Story provides this guidance on construction: "Where the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted, which, without departing from the literal import of the words, best harmonizes with ... the scope and design of the instrument."<sup>200</sup> The framers' conceptual model for the war powers is totally consistent with these overall patterns of the Constitution's design and structure.

First, legislative predominance throughout national government was a conceptual cornerstone.<sup>201</sup> After carefully analyzing the powers of the executive nearly clause-by-clause<sup>202</sup> Hamilton concluded by stating:

In the only instances in which the abuse of the executive authority was materially to be

feared, the Chief Magistrate of the United States would, by that plan [the proposed constitution], be subjected to the control of a branch of the legislative body.<sup>203</sup>

Madison considered the legislative powers so expansive that he warned, "it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precaution."<sup>204</sup> Assigning the decisional war powers to Congress as a whole, not just the Senate,<sup>205</sup> was consistent with this fundamental design.

Second, the war powers model is consistent with the general power structure running throughout the entire Constitution. Some scholars conclude that the distribution of power between the political branches in foreign affairs is fundamentally different than in domestic affairs.<sup>206</sup> This is true only if the Constitution is analyzed in terms of what it has become. The original structure for the exercise of all constitutional power was the same: the legislative function was primarily decisional--to contemplate, deliberate and create policies, laws, and give "advice" to the executive in the creation of treaties;<sup>207</sup> the

executive function was primarily<sup>208</sup> operational--to carry out and enforce<sup>209</sup> the legislative decisions, to conclude treaties<sup>210</sup> for Senate approval, and to control uses of force; and the judicial function was applicational--to apply the laws and treaties to specific cases, and later when the concept of judicial review crystallized,<sup>211</sup> to determine the constitutionality of governmental acts and enactments. The original war powers model was not an anomaly. The framers' model reflected the same general power structure embodied in the Constitution. Design of the war powers model is strikingly similar to the only other significant foreign affairs power addressed in the Constitution--the treaty power. Both powers were institutionally sub-divided along functional lines for efficacy sake.

#### d. THE INTRINSICS: CONCLUSIONS

The intrinsic materials are quite limited, but sufficient to construct a general conceptual model for the war powers. Intensive analysis of the text, what it meant to the framers, and how the framers arrived at the text leads to the following conclusion: that the framers divided the war powers by assigning Congress the primary decisional aspects and the President the

subordinate, yet no less important, operational aspects. Analyzing all the grants together, the model represents a logical, internally consistent approach. Finally, the model is consistent with overall patterns which run through the Constitution as a whole.

The impact of historical antecedents can be seen in this model. Somewhat predictably the framers experimented in addressing the historical abuses and deficiencies. They produced a unique conceptual model for the war powers. The subsequent discussion returns to extrinsic materials, once again looking beyond the actual text to discover meaning. Although the intrinsic materials are primary, the first extrinsics encountered, The Federalist Papers, are particularly valuable in discovering the "intent of the framers."

#### 4. MORE EXTRINSICS: THE RATIFICATION PROCESS MATERIALS

##### a. THE FEDERALIST PAPERS

The authors of The Federalist Papers wrote for the express purpose of favorably influencing the ratification process in New York, therefore, these papers are technically ratification process

materials.<sup>212</sup> Assessing the impact of this work upon the ratification processes is speculative.<sup>213</sup> The degree to which these three commentators<sup>214</sup> reflected the common understanding of the framers, the ratifiers, the public, or anyone else is indeterminable.<sup>215</sup> However, this work represents an actual commentary on the text, it reflects some of the thought processes which went into drafting, and defends the product from erroneous interpretations. In these respects, the work is of singular importance to textual interpretation.

Assessing the interpretive value of The Federalist Papers is somewhat problematic. As previously noted, the authors wrote to "sell" the Constitution to the ratifiers of New York, a key state.<sup>216</sup> Hamilton, who wrote the bulk of these papers, may have disingenuously restrained his insights,<sup>217</sup> thereby reducing the value of the work. As a New Yorker who strongly supported ratification, he had sufficient incentive to "tone down" extreme views.

Another problem concerns the scope and depth of the papers. The authors address only the most serious concerns of the public, so coverage of text is not comprehensive. Most of The Federalist Papers which

deal with the "common defence" or war powers address the fear of "standing armies" in peacetime, the aversion to creating a national military, and the abiding suspicion of allowing national control over the states' militias.<sup>218</sup> Nor is the detail of the discussion uniform throughout. Since the public generally feared a unitary executive, Hamilton mentioned the President's role as Commander-in-Chief five times.<sup>219</sup> In every instance the discussion is consistent with the conceptual model: the President wields the subordinate operational war powers. Discussion of Congress's power to "declare war" is virtually non-existent.<sup>220</sup> The most helpful exposition appears within the context of Madison's attempt to allay fears of the new government's power. At one point Madison implies that the powers of "war and peace" lie with Congress just as under the Articles of Confederation.<sup>221</sup> This very brief, ambiguous discussion is consistent with the conceptual model: Congress wields the primary decisional war powers. The Federalist Papers provide unmatched insight into the minds of two key framers and the society in which they lived and wrote. As a comprehensive commentary on the meaning of the Constitution the papers are hopelessly deficient; however, the limited treatment of the war powers generally confirms the war powers model

previously derived.

b. THE STATE RATIFICATION MATERIALS

Ratification was a singularly important chapter in the history of our Constitution. Without state approvals the document would have been just so many words. As an extrinsic source of textual meaning, Madison may have overstated the value of the ratification materials when he said: "If we were to look ... for the meaning ... beyond the face of the instrument, we must look for it, not in the General Convention which proposed, but in the State Conventions which accepted and ratified it."<sup>222</sup> Theoretically Madison is correct. The ratifiers' understanding of the text and the meaning they attached to the document is the true original meaning of our Constitution. Only the ratifiers could convert lifeless words into a living "supreme law" for America. Unfortunately, discovering their common understanding of the war powers is impossible. With respect to the war powers, the ratifiers simply adopted the framers' work. At best these materials provide a gloss to the text. Additionally, they provide a broader and deeper view of the society that gave life to our Constitution, which is helpful.<sup>223</sup>

Even a cursory review of the ratification materials reveals their shortcomings. The records from the various state ratification proceedings vary considerably in length and quality, some are nearly useless.<sup>224</sup> Even assuming that each of the states discussed or debated the same portions of text, the differences in the quality of the records makes it impossible to discover the meaning that each state ultimately gave to the text. Plus it is highly doubtful that there ever was a common understanding between the hundreds of ratifiers<sup>225</sup> who met at different times in different places. If there was a common understanding, it is lost to time.

Based upon the extant record, the war powers received spotty, shallow treatment by the ratifiers. There was little debate over the proper allocation of this power between the two political branches. The issue was apparently not very controversial.<sup>226</sup> Discussion of the framers' substitution of "declare war" for "make war" at Philadelphia does not appear in any state record.<sup>227</sup> The real controversy in nearly every state surrounded the power to keep a national "standing army" in peacetime. A few states wanted to require a two-thirds vote for a declaration of war. A

few others expressed concern over designating one man as Commander-in-Chief, and the possibility of the President actually commanding in the field. Generally, the ratifiers debated issues of no concern to us modernly. Conversely, the modern issues were not controversial to them.

One debate appears often enough to merit mention. The debate concerns the traditional British maxim requiring separation of the power of the "purse" from the power of the "sword." This maxim was widely known and three records reflect debate.<sup>228</sup> The maxim was obviously not as well understood as it was known because in two debates a speaker had to explain the "true" meaning of the maxim. Apparently the "true" meaning was that within a government, different branches (or officials) ought to possess the respective powers to fund a military and employ that military. Several ratifiers perceived that the Constitution violated this maxim since Congress evidently held both powers. Several champions of liberty quickly made this a point of contention.<sup>229</sup> The records are difficult to follow, but in all three instances the response<sup>230</sup> was that a large, popular assembly like Congress could be safely trusted - unlike a Monarch.<sup>231</sup> These debates clearly show that the ratifiers, in at least three

states, recognized that Congress wielded the decisional war powers.

Given the inadequate record and the sporadic treatment of the war powers, the ratification materials make a very limited contribution to understanding original intent. Standing alone they neither add to nor subtract from the war powers model developed earlier.<sup>232</sup> The clearest expressions of overall understanding and the states' concerns are found in the ratification documents returned to Congress.<sup>233</sup> Some states ratified without comment; others like Rhode Island returned massive declarations of proposed amendments. None of the states expressed serious concern with the Constitution's war powers model.

##### 5. MORE EXTRINSICS: CONTEMPORANEOUS CONSTRUCTION<sup>234</sup>

Reliance on contemporaneous construction to definitize the meaning of a written instrument is often indispensable, especially with a vague and general document like our Constitution. Within his rules of interpretation, Professor Story states: "Much also, may be gathered from contemporary history and contemporary interpretation, to aid us in just conclusions."<sup>235</sup> In

explaining why he did not publish his diary of the Convention earlier, Madison stated: "In general it had appeared to me that it might be best to let the work be a posthumous one; or at least that its publication should be delayed till the Constitution should be well settled by practice ...."<sup>236</sup> Contemporaneous construction undeniably furnishes meaning; however, a host of problems attend its use as a source of textual meaning. Without the exercise of extreme care, practices cited as being indicative of "true" meaning can lead to absurd constructions.

a. THE PECULIAR PROBLEMS WITH INTERPRETING PRACTICES

Practices often arise within the context of severe time pressures, especially in the war powers arena. The actors find themselves operating under the tyranny of the urgent. They adopt courses of action which are inconsistent with their personal philosophies, or worse, which are inconsistent with the Constitution. President Abraham Lincoln undoubtedly felt an urgent need to act on 12 April 1861, when Confederate forces attacked Fort Sumter, South Carolina. Lincoln responded, and his unilateral acts became the famous eleven weeks of "constitutional dictatorship."<sup>237</sup> After Lincoln, the Commander-in-Chief clause never returned

to its anemic ante-bellum construction.

Practices often result from extra-constitutional factors having little to do with translating the Constitution's words into deeds. Actors frequently create, or at least stretch, constitutional text and theory to justify practice. Often this justification process occurs after the act has taken place.

President James Monroe's administration provides an example.<sup>238</sup> In 1818, Georgia faced cross-border raids from runaway slaves and Indians operating out of Spanish Florida. Monroe felt compelled to undertake limited military operations to stop these raids. Without consulting Congress, Monroe dispatched General Andrew Jackson with orders to act in self-defense, pursue the Indians into Florida if necessary, and avoid conflicts with the Spanish.<sup>239</sup> General Jackson proceeded to invade Florida, attack a Spanish fort, hang two British citizens, and occupy Pensacola which was the capital of Spanish Florida.<sup>240</sup> Several cabinet members viewed these aggressions as the initiation of war, and Congress was not far behind. Needless to say there was a war powers problem. Monroe's Secretary of State, John Q. Adams, tried to persuade the President and his cabinet to justify these war-like acts by categorizing them as "defensive" or as incidental to a

defensive military operation.<sup>241</sup> Monroe rejected this creative expansion of the President's well established power to repel sudden invasions, but he did not repudiate Jackson's acts (or court-martial him as Secretary of War John Calhoun advised). The executive branch had acted beyond its constitutional authority, but due to other extra-constitutional factors the acts stood.<sup>242</sup> Jackson's campaign persuaded Spain to sell Florida which eliminated the security threat posed by Spanish Florida and expanded America's borders. Politically Jackson was a hero. Subsequent presidents would justify unilateral uses of force using the broad interpretation of the Commander-in-Chief 's "defensive" war powers invented, but rejected, by the Monroe administration.

Use of contemporaneous constructions to give meaning to the Constitution is clearly problematic. The examples show that time pressures and extra-constitutional factors totally independent of the text or the "intent of the framers" often impelled these early officials attempting to run national government. Sometimes even the framers acted inconsistently with their prior words and deeds.<sup>243</sup> Despite the problems, contemporaneous construction has at least two valid uses with respect to constitutional construction. But scholars must carefully examine the full historical

context of each cited word and deed to derive their true implications. Upon close examination, the implications will often be too uncertain to provide authoritative textual meaning.

b. USE OF CONTEMPORANEOUS CONSTRUCTION

In the search for original intent, contemporaneous construction can provide useful extrinsic materials. Constitutional jurisprudence recognizes two valid uses for contemporaneous construction. They are related, yet distinct and often confused. With respect to the Constitution's war powers, one must have a clear grasp of contemporaneous construction -- the two valid uses, the requirements for each use, and the concomitant implications -- because subsequent words and deeds have filled so many of the gaps left for extrapolation.

(1) INTERPRETIVE USE TO EXPLAIN AND EXPAND THE  
DRAFTER'S INTENT

This is the classic use of contemporaneous construction.<sup>244</sup> Professor Story states:

Contemporary construction is properly  
resorted to, to illustrate and confirm the

text, to explain a doubtful phrase, or to expound an obscure clause; and in proportion to the uniformity and universality of that construction, and the known ability and talents of those, by whom it was given, is the credit, to which it is entitled.<sup>245</sup>

Use in this manner is limited in certain respects and broad in others. First, it is limited with respect to the group of actors whose contemporaneous constructions are relevant. Professor Story implies this in his discussion above. Obviously, constructions from the framers themselves are "entitled" to the greatest "credit." Especially since throughout the earliest days of the Republic only the framers had a personal knowledge of the Federal Convention--its proposals, discussions, debates, and compromises.<sup>246</sup> Others who interacted closely with various framers had a glimpse of their intent;<sup>247</sup> those who read pamphlets and works like The Federalist Papers also had some understanding. Given the number of variables and uncertainties, very little "credit" should be given to contemporaneous constructions by non-framers unless there is clear evidence of special knowledge. Therefore, this form of use generally "died out" along with the framers. Second, this form of use is broad in the sense that any

expressive activities are relevant: any writings, any spoken words, any acts or practices. Finally, use in this manner is somewhat limited since there must be some extant text to interpret. If there is no text to explain or expand, this approach is impossible. This does not mean that every detail must be expressed; in fact, the primary utility of this form of use is in providing specific detail to the general constitutional framework. By implication, a corollary rule governs this form of use. As professor Story states: "It [contemporary construction] can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries."<sup>248</sup> This is why construction of the original conceptual model is vital: it sets boundaries for the use of this type of extrinsic material.

There is sufficient war powers text for this form of contemporaneous construction to be helpful. For example,<sup>249</sup> President Washington, relying solely upon his independent powers as Commander-in-Chief, authorized General Wayne to dislodge a British force located 20 miles within the undisputed American boundary if necessary. Washington dispatched General Wayne primarily to fight Indians, and General Wayne was

able to accomplish his mission without attacking the British. If these are the facts, this act by a framer serves to explain and provide specific meaning to the Commander-in-Chief 's "defensive" war powers. Washington construed his independent powers as Commander-in-Chief narrowly.

When there really is no text to construe, the second use for contemporaneous construction becomes relevant. This is where the confusion generally begins.

(2) SUBSTANTIVE USE WHEN THERE IS NO DRAFTER'S INTENT

In very limited situations, frequent repetition of a specific practice<sup>250</sup> dating from the earliest days of the Republic creates constitutional substance--a constitutional fact.<sup>251</sup> Professor Story implicitly recognizes use of contemporaneous construction in this manner when he states:

And, after all, the most unexceptionable source of collateral interpretation [of the constitution] is from the practical exposition of the government itself in its various departments upon particular questions

discussed, and settled upon their own single merits. These approach the nearest in their own nature to judicial expositions ....<sup>252</sup>

Creation of the President's independent power to "recognize" foreign governments is a commonly cited example of substantive use.<sup>253</sup>

This form of use differs in two key respects from the first form. First, since there is no interpretive aspect to this form the framers need not be the actors.<sup>254</sup> Even on-going practices are relevant to this form of use. Though this form did not "die out" with the framers, to have the greatest legal impact a practice must have begun during the earliest days of our Republic. Second, unlike the first form, not all expressive activities are relevant. This form of use requires an act or practice, not a mere written or oral assertion of constitutional authority.<sup>255</sup> The need to unambiguously place other governmental entities on notice of the potentially challengeable act or practice is the reason for this latter requirement.<sup>256</sup> Challenged acts or practices generally do not result in the creation of constitutional substance<sup>257</sup>--there must be longstanding acquiescence by the other governmental entity which matches the longstanding practice.

A critical aspect of this second form of use is the ultimate impact it may have upon constitutional balances of power. Based upon legal precedent,<sup>258</sup> courts should treat practices differently depending upon when they began. Generally, only those practices traceable to the earliest days of our Republic are "constitutional facts";<sup>259</sup> all other practices are mere "legislative facts."<sup>260</sup> The difference is significant from a legal standpoint since practices which are "legislative facts" may be overcome by subsequent congressional enactments. For example, if a court found that the presidential practice of using force based on his independent authority as Commander-in-Chief was a mere "legislative fact," then a subsequent congressional enactment, such as the WPR, would bind presidents and circumscribe their powers. Conversely, if a court found that the presidential practice was a "constitutional fact," then there is little doubt that a mere enactment could bind the President. In effect, a practice arising to the level of constitutional fact settles the matter under the Constitution. Clearly this is a substantive form of use.

Past practices have largely determined the current allocation of the war powers. The framers' conceptual

model has been implicitly rejected. Coalescence of a diverse web of presidential practices, novel constitutional theories, and assorted court dicta is the basis for the President's broad claim on war powers. Though most of these presidential practices and theories have dubious constitutional foundations, and few meet the requirements for valid use as contemporaneous construction, courts have been unwilling to settle the matter. So far all presidents have escaped a final adjudication of their war powers.

### (3) CONCLUSIONS ABOUT CONTEMPORANEOUS CONSTRUCTION

First, use of contemporaneous construction poses unique problems and requires great caution. Trying to discern the true implications for cited words or deeds mandates careful research and consideration of time pressures and the extra-constitutional factors. Second, contemporaneous construction can be used in two valid ways: to interpret original intent and to create constitutional substance. Either form of use generally requires contemporaneous constructions by a framer to be of constitutional moment. The first form of use elevates the intrinsic materials, and contemporaneous constructions take on a subordinate interpretive role.

The second form of use allows extremely few longstanding practices to attain "constitutional fact" status. In cases of constitutional construction, the uncertainties associated with using contemporaneous constructions normally outweigh their interpretive value. Contemporaneous constructions have the most value to those who cite them carelessly. Their vast expanses provide the raw materials to construct nearly any constitutional theory or justify nearly any act.

c. EARLY PROBATIVE CONTEMPORANEOUS CONSTRUCTION

Contemporaneous constructions which legitimately meet the requirements just discussed provide useful extrinsic materials in the quest to discover the "intent of the framers." Two questions arise. Are there interpretive contemporaneous constructions by framers which alter or disprove the original conceptual model? Are there longstanding practices traceable to the earliest days of the Republic which provide additional substance to the conceptual model? A brief survey shows that neither question gets much of an historical response.

THE PRESIDENTS AND CONGRESSES

The two terms of President George Washington were relatively peaceful. Indian tribes in the North and South caused continuous problems for settlers during the first term,<sup>261</sup> and the Whiskey Rebellion occurred in the second term.<sup>262</sup> Neither of these situations had significant implications for the war powers. During the Whiskey Rebellion, Congress passed a law calling forth the militia to suppress this insurrection; Washington became the first and last Commander-in-Chief to take brief field command of the militia.<sup>263</sup> Practices during suppression of the Republic's first rebellion nominally<sup>264</sup> ratify the conceptual model: Congress as the decision-maker and the President as the commander of operations. Whether the President or Congress had the final authority to declare neutrality was the most significant war powers related issue addressed during Washington's presidency. Struggle over the authority to declare neutrality arose late in Washington's first term. In 1793, French sympathizers challenged Washington's constitutional authority to proclaim American neutrality in the French-British War. The controversy inspired the now famous Pacificus (Hamilton)- Helvidius (Madison) exchange which grew into a broad debate about the extent of the executive's foreign affairs power.<sup>265</sup> Just over a year later, this presidential "practice" ceased. On 5 June 1774,

Congress passed the first in a long succession of Neutrality Acts. But if Congress won this battle, they clearly lost the war. The arguments of Hamilton, which essentially contradicted his Federalist Paper views, provided the basis for subsequent expansion of the President's foreign and domestic powers.<sup>266</sup>

President John Adams conducted an "imperfect" naval war with France for about two years.<sup>267</sup> Adams worked closely with Congress, perhaps even manipulated Congress, to avoid a formal declaration of war which many wanted. At times the President appeared unsure of what he wanted. Former Senator Jacob Javits argues that the Constitution's system of divided war powers was the ultimate key to avoiding full war.<sup>268</sup> The avoidance, whatever caused it, was probably fortunate because a full war with France would have been disastrous for America.<sup>269</sup> Adams sought and obtained congressional authorizations to conduct his "imperfect" war,<sup>270</sup> which is consistent with the model. However, just four months earlier he unilaterally informed Congress of his policy decision to allow merchant vessels to arm (reversing a former policy).<sup>271</sup> This was inconsistent with the model since such a presidential policy decision could have triggered war or enlarged an

"imperfect" war. In response several leaders, including Jefferson (then Vice President) and Madison, voiced opposition to what they believed were acts beyond presidential authority.<sup>272</sup> Despite the protests, the act stood. Thus, under Adams the President's role in making war related policies expanded. Congress was already beginning to suffer from institutionally embedded vices. This early practice provided a basis for similar policy initiatives by subsequent presidents.<sup>273</sup>

President Thomas Jefferson carried on a war with the Barbary pirates for approximately four years. Depending on the account referenced, Jefferson either deferred to Congress's decisional war powers,<sup>274</sup> or covertly authorized and prosecuted his own private war.<sup>275</sup> Though Jefferson was an outspoken opponent of broad executive power, his actions with respect to these pirates are astonishing. He independently deployed naval forces against a foreign power to protect an inchoate national interest--foreign trade.<sup>276</sup> Much later he consulted Congress. Professor Henkin cites Jefferson's act as the basis for subsequent presidents who have "assert[ed] the right to send troops abroad on their own authority."<sup>277</sup> Whether Jefferson succumbed to time pressures, or extra-

constitutional factors, or temporarily changed his philosophy scholars may never know. The Barbary private episode underscores the problems with relying on contemporaneous constructions. Jefferson's acts strongly contradict his words. At this point it is nearly impossible to research the full context of each word and deed. Proponents and opponents of broad presidential war powers can both cite portions of this same historical event to bolster their arguments.

The final contemporaneous construction of significance occurred during Madison's presidency. The interaction between President James Madison and Congress which led to America's first declared war, The War of 1812, is consistent with the conceptual model. Though Madison felt that the nation was unprepared for war, he believed that most wanted war and that British insults had been tolerated long enough.<sup>278</sup> This was not an occasion when the President merely presented Congress with de facto war, and then asked for approval. Madison recommended that Congress declare war and left the decision to them. In his war message of 1 June 1812, he states:

Whether the United States shall continue  
passive under these progressive usurpations

... or, opposing force to force in defense of their national rights, shall commit a just cause into the hands of the Almighty Disposer of events ... is a solemn question, which the Constitution wisely confides to the legislative department of the government.<sup>279</sup>

It took Congress 18 days to return a decision for war. America's poor military showing vindicated Madison's belief that his nation was not prepared, however, he clearly deferred to Congress's decisional war powers.

#### d. EARLY JUDICIAL INTERPRETATIONS

The courts have not always avoided war powers issues. A few very early cases provide helpful interpretation of the Constitution's war powers. Today, the courts have essentially abdicated their role with respect to the war powers leaving the political branches to compete. The situation is hopelessly exacerbated by the constitutional reality that without formal amendment, only the courts can interpret constitutional text or authoritatively determine which practices are "constitutional facts." Like contemporaneous construction, judicial opinions are subject to citation abuses. The handful of war powers

cases have been read, interpreted, cited and generally exploited to justify actions of doubtful constitutionality.<sup>280</sup> Therefore, scholars must carefully handle this material.

The first set of cases spring from President Adams' quasi-war with France.<sup>281</sup> They deal with the capture and confiscation of enemy ships as "prizes." They establish the important precedent that the constitutional definition of "war" is broad, encompassing limited uses of force as well as full-scale war. Moreover, Congress is to decide the appropriate level of war, whether "general war .... limited war; limited in place, in objects, and in time ...."<sup>282</sup>

An early pattern for political branch interaction within the war powers arena was for Congress to enact a law enabling the President to conduct military operations at his discretion within the parameters specified. One such law enabled the President to call forth a state's militia under specified exigent circumstances.<sup>283</sup> In Martin v. Mott,<sup>284</sup> the court upheld the constitutionality of legislation which delegates broad powers and discretion to presidents. Additionally, the court held that only the President,

within his discretion, could determine if one of the specified exigencies existed.<sup>285</sup> Thus Congress can enable the President to meet almost any war powers exigency through broad delegations, but Congress can also specify parameters.

In Brown v. United States,<sup>286</sup> the court held that the President's authority as Commander-in-Chief did not extend to confiscation of enemy property in time of "declared war" without express authorization from Congress.<sup>287</sup> This case epitomizes the initially anemic construction of the Commander-in-Chief power. This interpretation of the Commander-in-Chief clause is undoubtedly too limited in light of the realities of modern warfare.<sup>288</sup>

Although the next case is neither an early case nor a Supreme Court decision,<sup>289</sup> it sanctions a significant addition to the President's operational war powers: the power to protect American lives and property abroad.<sup>290</sup> In Durand v. Hollins, the court ultimately found a "political question." However, the court conducted a preliminary inquiry and determined that the President had plenary constitutional authority to deploy naval forces to Greytown, Nicaragua for the protection of Americans and their property.<sup>291</sup> This

case exemplifies judicial recognition of an early, longstanding practice.<sup>292</sup> No court has declared this a "constitutional fact," but it meets the criteria previously discussed. Although this power was not specified in section 5(c) of the WPR, Congress generally concedes that the Commander-in-Chief clause includes this independent power.<sup>293</sup>

This discussion of significant judicial cases has been disjointed, but such is the nature of case law in the war powers arena. It develops slowly by accretion. Well considered and drafted legislation, or other informal fix, will always be preferable because it can be comprehensive and perhaps not as exploitable.

#### e. LATER PRACTICES BY PRESIDENTS AND CONGRESSES

Though often cited as authoritative, most war power practices and underlying theories developed after the earliest days of the Republic have no value with respect to altering the original conceptual war powers model. Practices have developed because they work, not because the framers intended them. This is essentially the adaptivist approach to constitutional law.<sup>294</sup> Usually there is no problem with this approach because the Constitution meant to be adaptable. There is a

problem when practice evolves so far that the conceptual model is effectively read out of the Constitution. In 1973, Congress perceived that this was the situation with the war powers. They reacted by passing the WPR. As discussed, the WPR was stillborn. While there are ways to remedy the dispute over the war powers, the point of departure must be agreement by the political branches over the "intent of the framers."

#### C. CONCLUSIONS: THE ORIGINAL CONCEPTUAL MODELS FOR THE WAR POWERS

Many scholars have found the framers' intentions for the war powers too enigmatic to be helpful. Admittedly there is little substance and no specifics, but what more could be expected from a Constitution? After considering and evaluating all the intrinsic and extrinsic materials, only five conclusions can be drawn: first, the legislative and executive branches were intended to be war power partners; second, the legislative branch was to dominate the partnership; third, rather than concurrent powers each partner was assigned a specific function; fourth, the legislative branch was to function as the contemplative, deliberate decision-maker; and fifth, the executive branch was to function as the faithful, energetic executor of the

decisions.

#### IV. THE CONCEPTUAL MODEL APPLIED: WHY DIDN'T WE FOLLOW THE ORIGINAL CONCEPTUAL MODEL?

##### A. EXECUTIVE ASCENDANCY

In the wake of Operation Desert Storm, some may question whether Congress has a viable role in the war powers partnership. Executive initiative led to the deployment over 200,000 armed American soldiers to Saudi Arabia to draw a defensive "line in the sand."<sup>295</sup> Executive speed and efficiency deployed the necessary military forces. Executive diplomacy and political maneuvering built and maintained the multinational alliance, secured the United Nations' sanctions, and kept Congress supportive.<sup>296</sup> Executive ability to concentrate power destroyed the Iraqi forces with minimal friendly losses. Considering the framers' belief that they had created a weak executive and a tyrannical legislative branch,<sup>297</sup> what has happened since 1789 to alter the original balance of power so radically? The answers are found in the institutional nature of the partners, in the unforeseeable changes to warfare, and in America's changed role in world

affairs.

B. A THRESHOLD CONCEPT: FLUCTUATING<sup>298</sup> POWERS

This thesis argues that under the original war powers model the partners had distinct functions, divided along the lines of their institutional strengths. This position makes the concept of fluctuating powers nearly irrelevant. However after the earliest administrations, the practices increasingly reflect *general abandonment of the*

original model and adoption of a model where the partners share indivisible concurrent<sup>299</sup> powers. The subsequent struggle has been over the undivided whole. Historically the war powers have fluctuated depending upon the relative strengths of the political branches at that time. For the most part, power has flowed unidirectionally to the President. When courts abdicate their judicial review function, the only two mechanisms by which governmental powers can fluctuate are legislative enactments<sup>300</sup> and practices which rise to the level of legislative or constitutional facts.<sup>301</sup> Given these two mechanisms and the absence of any textual delineation of the war powers, the President has easily overpowered the defenseless Congress.<sup>302</sup> For the very essence of the executive's role in government

is to act with dispatch; legislative enactments take time and a consensus.

Similar to a conquering army invading enemy territory, presidents began encroaching upon Congress's territory by acting pursuant to alleged constitutional authority based on a variety of theories. Over a period of approximately 160 years, presidents gradually and methodically captured the war powers through practice. Congress eventually revolted by enacting the WPR, but nearly all presidents have considered the contest settled and victory theirs'. From a constitutional perspective, the presidents are incorrect, but not a single court has ever attempted to liberate Congress by taking on this "political" challenge.<sup>303</sup>

#### C. INHERENT PROBLEMS WITH THE MODEL

From the beginning, the model displayed inherent problems. The framers' experimentation with combining the strengths of two distinct branches into one national war power, proved the model's undoing.<sup>304</sup> The problem was that the model formed a war powers partnership with two "unequally yoked"<sup>305</sup> branches.

## 1. THE LEGISLATIVE BRANCH: DESIGNED FOR DELIBERATION

The framers expected Congress to be a body of sagacious men who could address national problems through the process of contemplative debate, negotiation, and compromise. Congress was to be the more representative branch and serve as an integration point for public opinion, regional diversity, and concern for state and individual rights. The framers knew that this would be a relatively slow moving, deliberative branch. This was why they consciously assigned the decisional war powers to Congress: to give this weighty, serious matter appropriate consideration. Unfortunately, within the context of a national security crisis, Congress was normally unable to dispatch its war powers responsibilities.

## 2. THE EXECUTIVE BRANCH: DESIGNED FOR ACTION

The framers expected the executive to be an organization with a command type structure and a unitary head who could address national problems by translating congressional guidance and policies into vigorous action. The framers believed that a President brought energy, unity, dispatch, secrecy, and

initiative to government.<sup>306</sup> Waging war effectively required all of these characteristics. This was why the framers assigned the operational war powers to the President. Unfortunately within the context of a national security crisis, the President was able to meet his war powers responsibilities and usurp Congress's as well. The President often took the initiative and Congress was left to catch up if it could. Eventually the President began a pattern of presenting fait accomplis to Congress.

### 3. IN CRISIS: LEGISLATIVE DEFERENCE

Within the context of each new crisis involving the war powers mechanism, Congress consistently deferred to the President<sup>307</sup>--the explanation being the inherent institutional differences in the political branches. The presidency was at the zenith of its power in crisis. Even if the President infringed upon his partner's war powers, periods of crisis were when Congress was least able, or willing, to challenge the President.<sup>308</sup> As this interactive pattern persisted, the President gradually, sometimes in spurts, augmented his war powers. Eventually the executive achieved preeminence through practice.

#### 4. IN NORMALCY: LEGISLATIVE INDIFFERENCE

After the passing of each crisis, Congress generally failed to rectify any of the presidential encroachment. Why bother with passing a law after the fact? Of course individual congressmen have always asserted themselves, and certain congresses have battled specific presidents for short intervals.<sup>309</sup> But as an institution there was never a consistent, concerted effort to do anything about war power imbalances until passage of the WPR.<sup>310</sup> As previously discussed, it took the concurrence of extraordinary circumstances to give life to that legislation.<sup>311</sup> Within the context of peace and normalcy, the legislative branch quickly refocused on the burgeoning domestic problems: more numerous and complex than in the framers' day.<sup>312</sup>

Congress is a politicized institution. From the standpoint of political realities congressional indifference is understandable. Voters simply do not elect congressional representatives on the basis of their strong stance with respect to the war powers, or even foreign relations. So who can fault them for indifference when they merely reflect their

constituencies' priorities? A degree of congressional indifference is attributable to a reluctance to take on more work and responsibility. By fixing the war powers and reestablishing a balanced partnership, Congress would have to accept significant new responsibilities in an area where they possess minimal expertise. In modern times national security, and foreign relations in general, are complex and politically hazardous.<sup>313</sup> Congress is generally content to leave responsibility with the President.<sup>314</sup>

## 5. CONCLUSIONS

Executive ascendancy is the natural consequence of the original conceptual model when it operates within the context of a series of historical crises. Perhaps the framers should have foreseen the fatal flaw, but then they fully anticipated the need to amend their "imperfect" work.<sup>315</sup> The framers obviously did not foresee Congress's indifference with respect to protecting its decisional war powers from the President. The original model did not call for such a power struggle; moreover, the framers clearly thought that Congress had more than sufficient powers to protect itself--if it so desired. As Justice Jackson remarked in Youngstown Sheet & Tube Company, "[o]nly

Congress itself can prevent power from slipping through its fingers."<sup>316</sup>

#### D. EXOGENOUS FACTORS CREATING PROBLEMS FOR THE MODEL

Though the framers were learned men and had the foresight to draft an adaptable national blue-print, certain developments were simply unforeseeable.<sup>317</sup> Hidden from the framers were revolutionary developments in warfare and in America's role in world affairs.<sup>318</sup>

##### 1. UNFORESEEABLE CHANGES TO WARFARE

America is militarily capable of waging highly destructive warfare anywhere in the world within hours. This fact would probably unsettle the framers. Perhaps even more disturbing would be the discovery that the existing threats mandate such capabilities. The factors of enhanced lethality,<sup>319</sup> increased rapidity,<sup>320</sup> and worldwide deployability<sup>321</sup> broadly characterize the transformations in warfare which have greatly taxed the original war powers model. From the beginning, the framers saw the need to assign the operational war powers to the President. The presidency has largely kept pace with the changes to warfare through the development of various intelligence agencies,

communication networks, the National Security Council organization, and the massive Department of Defense. Therefore, the President has fulfilled his war power responsibilities. Conversely, as a deliberative and slow moving body, Congress's ability to effectively harness this faster, more capable, and more dangerous "dog of war" has diminished.

Closely related to this expansion in military capabilities was the increasing ability to employ different levels of force in a variety of ways. The concept of an operational continuum<sup>322</sup> gradually replaced the concept of a few well recognized, or customary, forms of conventional warfare.<sup>323</sup> In other words, expanding the capabilities meant expanding the missions. Use of force, or threat of force, as an instrument of foreign policy became an increasingly viable option. From an historical perspective, lesser uses of force for irregular type missions has been far more commonplace than use of conventional force for full-scale or limited wars.<sup>324</sup>

## 2. UNFORESEEABLE CHANGES TO AMERICA'S ROLE IN THE WORLD

America evolved from a weak, isolationist nation

concerned about "common defence"<sup>325</sup> for survival's sake, into a political, economic, and military world leader. This national metamorphosis, coupled with the increased ability to use force as an instrument of foreign policy,<sup>326</sup> had profound affects upon the decisional war powers. Intermixed with negotiation and diplomacy, force is still a powerful tool for dealing with foreign nations. Notwithstanding the United Nations and its prohibition on aggressive force, Operations Desert Shield and Storm are stark reminders that not all nations are ready to "beat their swords into plowshares."<sup>327</sup> Integrating use of force into a consistent foreign relations package is difficult for a Congress which neither controls the foreign relations apparatus, nor maintain an institutional expertise in this vast and ever changing area.<sup>328</sup> The President's gradual ascendancy in foreign relations--which paralleled his ascendancy with respect to the war powers--has placed him in a commanding position. Congress is frequently at the mercy of presidential foreign policy initiatives. Sometimes these policies result in committing America to uses of force,<sup>329</sup> thereby allowing the President to directly encroach upon Congress's decisional war powers.<sup>330</sup> Thus, weaving military force into the fabric of the President's management of foreign relations significantly curtailed

Congress's ability to exercise the decisional war powers.

Not only was force integrated with foreign relations, but management of America's foreign relations became an increasingly weighty matter. Because of its relative political, economic, and military strength America became a world leader.<sup>331</sup> Internationalism replaced isolationism as the only viable option since our national interests became increasingly tied to the interests of other nations on our shrinking globe. With the Soviet Union's demise, America's relative strength looms even larger in world affairs. Instead of "free world" leadership, we will probably be looked to for global leadership. But leadership significantly increases the complexity and magnitude of the foreign policy issues. From an institutional standpoint Congress's capacity to be a decisive decision-maker and an effective policy setter decreases as the complexity and magnitude of the issues increase. With so many complex and competing interests, the congressional methodology of contemplative debate, negotiation, and compromise breaks down.

## E. CONCLUSIONS

The framers were wise enough to anticipate changes to America's future situation. That is why they drafted an adaptable Constitution. The quantity and quality of the changes might shock them, but certainly not the fact that change has occurred. After all, they also lived in an era of rapid change. Even if the framers had foreseen these revolutionary developments, they may or may not have altered their war powers model. Their basic assumption was that a generalized model could accept contextual change through adaptation. Indeed the original model may have remained functional, but for the more serious inherent problems with the model itself. As discussed, these problems caused the model to become increasingly dysfunctional as the unforeseeable contextual changes occurred.

## V. FIXING THE WAR POWERS: WHY BOTHER?

### A. RESPONDING TO ADVOCATES OF STATUS QUO

The advocates of status quo generally fit one of

three<sup>332</sup> categories: those who consider the matter at a constitutional impasse, those who are indifferent, and those who do not think it matters.

Advocates in the first category suffer from a shallow view of our Constitution and constitutional jurisprudence. There are three primary approaches to resolving disputes over constitutional interpretation<sup>333</sup> --the interpretivist, the intentionalist, and the adaptivist approaches. This thesis developed a conceptual model for the war powers using a modified<sup>334</sup> intentionalist approach. Though quite illusive, one can discover the "intent of the framers" using accepted interpretive methods. Clearly there is substance in the "zone of twilight,"<sup>335</sup> and there need not be a constitutional impasse. By asserting this original conceptual model<sup>336</sup> and relying on the judicially created concept of fluctuating powers,<sup>337</sup> Congress has the basic constitutional arguments to recapture the decisional war powers. Though the WPR was a poor first attempt, Congress can effectively reassert itself if it desires. The issue becomes whether America would benefit most from more adversative legislation or some alternative fix.

Advocates in the second category suffer from a

shallow view of what constitutional government means. These advocates apparently believe that to effectively use the war powers Congress must bow to the President --that "the ends justify the means." John Locke did not think so, he advocated government of laws and not of men.<sup>338</sup> If the rule of law means anything and Americans truly value constitutional government, then something must be done about the executive branch's accumulation of governmental powers. The issue is how much further the nation can go without formally amending our 18th Century Constitution.

Advocates in the third category suffer from a shallow view of America's future role in the "new world order."<sup>339</sup> The Cold War is over, but America cannot simply retreat within its borders. In the short-term there are proliferating regional conflicts as the world settles under this new order.<sup>340</sup> For the long-term, can any worldwide coalition effectively end all use of force in a world of scarce and declining resources? Fixing the war powers to ensure that the political branches cooperate in the use of force does matter. The issue is not whether America will be a participant and leader in world affairs; the issue is how to effectively organize our government to meet the challenges of the 21st Century.

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## B. CORRECTING THE PROBLEM: CONSTITUTIONAL LEVEL

### 1. GROWING CONSTITUTIONAL IMBALANCES

Within the war powers arena there are at least two disturbing trends which implicate constitutional principle. First, the framers attempted to prevent the accumulation of power anywhere within government by adopting the principle of "separation of power[s]." They believed that such accumulations destroyed popular governments.<sup>341</sup> As discussed, the executive has almost exclusive control over the once divided war powers. This should send a clear warning signal.<sup>342</sup> Second, the framers attempted to achieve an "equilibrium":<sup>343</sup> balance<sup>344</sup> and cooperation<sup>345</sup> within government by resorting to a system of "checks and balances" which blended the separate branches. The war powers has become an adversative arena as typified by the WPR. As will be discussed, Congress's constitutional checks have not effectively prevented executive encroachments. How far can this de-stabilizing process go? America's Constitution may already be reaching the limits of mutability.

## 2. SLIDING DOWN THE "SLIPPERY SLOPE" WITHOUT A BRAKE?

### a. THE LEGISLATURE: A NON-PLAYER BY FATE

The Constitution arms Congress with several powerful checks. Within the war powers arena, these checks have proven unwieldy, time consuming to use, and dependent on normally nonexistent bipartisan support. Needless to say, they have lacked effectiveness. Moreover, when Congress has used its checks, our decision-makers have not always exercised sound discretion and self-restraint. Normally Congress uses its checks in a reactionary mode. For example, in the latter stages of the Vietnam War, after America's main withdrawal, Congress aggressively used its checks and "legislated peace in Indochina."<sup>346</sup> Congress was reacting to what it perceived as presidential abuse of the war powers. Congress's acts unduly interfered with the President's war powers and may have contributed to the unsatisfactory outcome.<sup>347</sup>

Congress's most potent check is the power of the purse, since Congress holds plenary authority.<sup>348</sup> Advocates of its use are many.<sup>349</sup> As a "check" on brief military operations, the purse strings may not be

effective. Presidents can circumvent the purse-- probably not legally--by using creative funding techniques or proxies.<sup>350</sup> Experience has shown that even during longer military operations, partisanship can prevent effective use of the purse strings. Super majority support is necessary to override a veto. In a few cases, congressional threats over money have forced a compromise.<sup>351</sup>

Our Constitution provides for impeachment, but it is exceedingly traumatic and cumbersome. Impeachment has never provided a viable way to check the President during periods of normalcy, let alone during national crisis. If President Andrew Johnson<sup>352</sup> could survive impeachment based upon abuse of presidential powers-- as opposed to commission of actual crimes--nearly every President will be immune.

One check has promise if there is broad public backing.<sup>353</sup> Sense of Congress declarations are non-binding, but Congress can pass them rapidly, when in session, by a simple majority vote. Congress can use these declarations in conjunction with strategies to marshall public support or its investigatory functions,<sup>354</sup> which rapidly focus public attention. Either way, Congress can generate a lot of political

pressure on the President.

b. THE JUDICIARY: A NON-PLAYER BY CHOICE

The courts have not used their power of judicial review<sup>355</sup> frequently enough to significantly affect the war powers arena. As discussed, early judicial involvement resulted in few important decisions.<sup>356</sup> In 1829, the United States Supreme Court<sup>357</sup> announced the political question doctrine.<sup>358</sup> Since then, outside of the Civil War precedents,<sup>359</sup> scholars have relied on "assorted dicta from court opinions"<sup>360</sup> to find support for their views.<sup>361</sup> Occasionally, courts render decisions which affect the war powers while addressing completely different issues.<sup>362</sup> The traditional reluctance of courts to enter the war powers arena makes them an unreliable arbiter.<sup>363</sup>

c. CORRECTING THE PROBLEM: STATUTORY LEVEL

The WPR is "dead letter."<sup>364</sup> It certainly has not reestablished a war powers partnership. Many original supporters have conceded that the law is ineffective and should be repealed or radically amended. Moreover, Congress has arguably used the WPR for political purposes: to attack the policies of presidents from the

minority party; or more commonly, to ensure that Congress will not be held accountable for military failure.<sup>365</sup> Theoretically, a vacillating President could even use the WPR to shift responsibility for action or inaction to Congress.<sup>366</sup> More ominously, some have claimed that the WPR undermines the operational effectiveness and safety of our troops.<sup>367</sup> Adversaries must at least question our resolve to use force when Congress debates the Commander-in-Chief 's authority in light of the WPR during military crisis. The WPR is definitely a problem because it does not work; the WPR may also be a problem simply because it exists.

#### D. CORRECTING THE PROBLEM: PRACTICAL LEVEL

An effective war powers partnership is necessary for the 21st Century. The Soviet Union's collapse may have actually increased global instability. The bipolar framework for military and political alliances is gone. Threats will increasingly come from unpredictable or unexpected sources and require immediate reaction.<sup>368</sup> Regional threats are now America's greatest concern,<sup>369</sup> and there is a likelihood of further balkanization<sup>370</sup> in the world. This creates the need to develop and continuously revise foreign policies which necessarily include use of force.

contingencies.

Using force to deter or contain communism was generally acceptable. For it was clearly in our national interest to combat those who sought to destroy us. Building national consensus for using force to further less concrete interests will be difficult. America's policy-makers should not use the phrase, "in the national interest," lightly or without clear definition when justifying actions. In turn, Congress must have meaningful input into the continuing process of clarifying these "national interests." Congress will need strong presidential leadership to keep America on course. The President will need congressional support to build consensus. Congress will also need an effective check on executive power, lest some future President drift into a "messianic foreign policy" mode<sup>371</sup>--and try to save the world. With such challenges before us, there is plenty for both of the war power partners to do. There are specific roles for each to play, but it will require cooperation. The ultimate goal must always be the development and execution of carefully considered, comprehensive, and consistent national security policies.

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## VI. RECOMMENDATIONS: WHERE DO WE GO FROM HERE?

Professor Henkin accurately summarized the ultimate solution for the war powers dilemma when he stated:

The quest must be for more and better cooperation, consultation, accommodation, by better legislative-executive modi vivendi et operandi.<sup>372</sup>

Many scholars echo or imply this same idea.<sup>373</sup> The challenge is to get the political branches to stop struggling long enough to create a cooperative solution; not just a bipartisan solution, but a good faith compromise between the two branches. So what must be done?

### A. FIRST STEP: PREPARING THE WAY

The first step must be to repeal the WPR. As already discussed, this law is not effective.<sup>374</sup> The WPR does not comport with the original constitutional model developed in this thesis.<sup>375</sup> Congress is not meaningfully involved in the decisional war powers.<sup>376</sup> The WPR will not prevent further presidential

ascendancy and has not made allowance for the contextual changes in which the war powers operate.<sup>377</sup> The WPR may actually undermine national security and will fail the nation in the 21st Century.<sup>378</sup> Finally, the WPR's adversative nature discourages genuine presidential-congressional cooperation, which is undoubtedly its greatest deficiency.

#### B. THE SECOND STEP: COOPERATION THROUGH COMPROMISE

The second step must be to provide a good alternative to the WPR, which may or may not mean a statutory fix.<sup>379</sup> To reach any compromise, both branches must know their respective constitutional bargaining positions as a point of departure. To establish these respective positions was the goal of this thesis--a return to the constitutional basics represented by the original conceptual model.

##### 1. THE BASIS FOR COMPROMISE

The basis for fixing the war powers should be: first, the original conceptual model; and second, the lessons gleaned from history, or our "experiences" to use the framers' own terminology. The model provides a constitutionally based foundation; experience enhances

the model by adding the "gloss which life has written."<sup>380</sup> Presumptively such experience reflects the most effectual means developed and proven by repetitious practice. Experience brings pragmatism to the theoretical. It represents an attempt to mold our 18th Century Constitution into what it should be today.

The original conceptual model provides a foundation. Division of the war powers between the political branches along functional lines is just as valid today as it was then. Though the concept must be adapted to allow for modern military capabilities, the prevailing threat, and the changed relative strengths and weaknesses of the political branches. The President, through maturation of the executive branch, has increased his ability to collect, analyze, and use national security information. By comparison, Congress has grown larger and more politicized. This has decreased its ability to quickly evaluate information and make rapid decisions. For example, the rapidity of warfare and the nature of the global threat from unpredictable sources renders the idea of a decisional war powers totally obsolete in certain urgent situations. Therefore, the President's operational war powers should be plenary for certain types of operations.

Experience provides the construction materials. Since President Adams' quasi-war with France (1789-1801), American presidents have independently used force more than two hundred times for a wide range of purposes. The presidents did not seek a declaration of war. Nor was there any costly, long-term military involvement.<sup>381</sup> For example, there have been counter-terrorist actions, actions to protect Americans and their property, evacuations of Americans and third-party nationals, peacekeeping efforts, policing efforts, airlifts, sealifts, freedom of navigation exercises, demonstrations of force, convoying operations, and others. Often, these lesser uses of force went without congressional protest or even comment. When Congress protested, presidents have justified their actions with several novel constitutional theories and arguments.<sup>382</sup> The text provides the best justification--the Commander-in-Chief clause which represents the President's operational war powers. Where the risk of costly or long-term military involvement is minuscule and the benefits are clear, the Commander-in-Chief's powers should be plenary. Though these practices may not be of constitutional moment,<sup>383</sup> such a vast body of historic practices is strong evidence of how the war

powers should actually work. Realities of national security and operational necessity constitute the important "gloss" of life.

One other category of experience is relevant, fortunately there are very few historical examples to cite.<sup>384</sup> At times Congress has unduly interfered with the Commander-in-Chief freedom of action. As previously discussed,<sup>385</sup> toward the end of the Vietnam War, a reactionary Congress used its appropriations power clumsily and contributed to the unsatisfactory outcome.<sup>386</sup> With respect to the Marine peacekeeping mission in Lebanon (1983-4), a very concerned Congress debated several ways to limit President Reagan's powers.<sup>387</sup> Eventually Congress enacted a resolution authorizing the mission's continuance for up to eighteen months; however, there is some evidence that the mixed signals sent by the vacillating Congress undermined the mission. Ultimately, the lives of 241 Marines may have been needlessly lost in a barracks bombing.<sup>388</sup> Experience shows that national security interests are best served when the President's operational war powers are given wide latitude and support during military operations.

After combining the original model with experience

what type of neo-conceptual model emerges? There is still a partnership and the functions are still divided to maximize institutional strengths and minimize weaknesses. Instead of a persistently dominant Congress, predominance fluctuates depending upon the type of military operation and the phase of the operation. Congress must relinquish the decisional war powers to the President for urgent, limited purpose operations. For less urgent operations, Congress exercises its normal decisional war powers in a conclusive, meaningful way before the hostilities. Once Congress decides to use force, then the Commander-in-Chief 's operational war powers should reign supreme.

## 2. THE COMPROMISE

This approach to fixing the war powers provides the potential for compromise and an invitation to cooperate. It requires Congress to recognize that the President must exercise the total war powers in many instances. Congressional involvement would depend upon the degree of urgency and risk involved in the specific operation. Congress should concede this to the President, since it is institutionally incapable of providing meaningful input in urgent situations.

Congress would also have to recognize that after they rationally exercise their decisional war powers, the President's operational war powers ought to be unfettered. Conversely, the President would have to recognize and accommodate Congress's war powers. Its constitutional right to exercise decisional war powers during the earliest phases of potentially high cost, long-term, operations of low--or ambiguous--benefit. The President should concede this, since Congress, is the decision-making body that is representative of the true sovereigns--the people. If Congress and the President bring such realistic, compromising attitudes together, then they can fix the war powers.

Institutional self-interest would also play a role. Congress would have to recognize the existing, albeit skewed, balance of power. However, Congress would be surrendering a relatively inconsequential portion of the decisional war powers to regain the consequential part. Based upon the original conceptual model and idea of fluctuating powers, the President ought to compromise since Congress is constitutionally capable of recapturing a much greater share of the war powers.<sup>389</sup> Both branches should realize that cooperation in fixing the war powers is in America's best interest for the 21st Century.

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## C. SPECIFIC RECOMMENDATIONS

Any future war powers arrangement must incorporate three general concepts: first, a continuum of congressional involvement; second, maximization of the Commander-in-Chief 's operational war powers once released; and third, a dispute resolution mechanism.

### 1. CONTINUUM OF INVOLVEMENT

Creating a continuum of congressional involvement<sup>390</sup> simply means establishing different levels of legislative involvement. The degree of involvement would depend upon three variables--the degree of urgency, the degree of risk to the nation (the potential costs), and the objectives pursued through the use of force (the potential benefits). In structuring the appropriate level of congressional involvement for each category of military operation, the decision-makers should consider all three variables; however, the degree of urgency is a threshold variable and entitled to the greatest weight in most cases. Beyond the threshold, Congress should consider and balance the potential costs and benefits against each other.

General operation of these three variables and the rationales are as follows.<sup>391</sup> As the degree of urgency increases, the realistic possibility for meaningful congressional involvement decreases and the President's war powers become increasingly plenary. To the extent that time permits any rational decision-making, Congress is generally the proper body to consider and balance the national costs and benefits. For Americans, the most essential aspects of cost are the number of American casualties and the duration of the operation.<sup>392</sup> As the potential costs increase, congressional involvement should increase because national resources are at risk, and the most representative branch ought to have considerable input. The variable of "benefits" is the most difficult to articulate. The phrase "in the national interest" is trite, but inherently ambiguous.<sup>393</sup> As previously discussed, Congress should have a significant role in clarifying this ambiguity.<sup>394</sup> Obviously, such clarification ought to occur outside of the context of a national security crisis. As the potential benefits increase, congressional involvement may decrease since the President can assume broad, unified support.

## 2. FREEING THE COMMANDER-IN-CHIEF

The zenith of congressional power is during the decisional phase;<sup>395</sup> the zenith of the President's power is during the operational phase.<sup>396</sup> The original model clearly established this functional division.

Historically congressional interference with the Commander-in-Chief's war powers has been in reaction to perceived presidential usurpation of Congress's war powers. Therefore, fixing the war powers to clearly reestablish the functional division of power--if both partners will stick to their proper roles--solves this problem. Any war powers fix must furnish a clear understanding of, and insure mutual respect for,<sup>397</sup> the respective roles of the partners. During military operations, Congress must not interfere with the President's freedom of action. The proper time for Congress to exercise power is before unchaining the "dog of war."<sup>398</sup>

## 3. PROVIDING A CONFLICT RESOLUTION MECHANISM

Any war powers fix requires a way to resolve differences between the partners. The entire war powers mechanism has suffered too long because it lacks

such a non-politicized final arbiter. Issues resurface and there is no final resolution. Neither partner feels bound by the acts, claims, or theories of the other. There is perpetual struggle.

Providing procedures to ensure judicial review may not be the best solution.<sup>399</sup> Courts have consistently refused to decide war power issues based on a self-admitted lack of expertise and a belief that the political branches should make such policy decisions.<sup>400</sup> Undoubtedly there is some wisdom in this position. Judicial opinions tend to be narrowly drawn<sup>401</sup> and untimely, since the courts receive the intractable issue after the problem arises.

An informal conflict resolution mechanism may provide a preferable alternative.<sup>402</sup> There is greater flexibility in structuring the actual composition of the resolving body. There would be greater security if the issues involved sensitive national security situations or information. Some mechanism to force the two branches to sit down and definitively resolve their differences is essential. Ultimately this is the type of cooperative "struggle" envisioned by the framers and is consistent with the methodology of negotiation and compromise used throughout our government. Whether by

court decision or informal mechanism, any fix must provide an effective and timely way to resolve disagreements with a finality that binds the two political branches.

## VII. CONCLUSIONS

The fifty-five men who drafted our Constitution certainly earned an appropriate title--framers. They gave us the great framework for a great nation. But using their work is not always easy, especially in the area of foreign relations. As Professor Henkin notes:

How well the blueprint was conceived is still debated almost two centuries later, and how well the machine has worked is a living issue. Perhaps the "contraption" was doomed to troubles from the beginning, for while the Fathers ended the chaos of diplomacy by Congress and of state adventurism, the web of authority they created, from fear of too-much government and through contemporary political

compromise, virtually elevated  
inefficiency and controversy to the  
plane of principle, especially and  
foreign relations.<sup>403</sup>

Often we give these men too much credit, for as Justice Jackson lamented in the Youngstown Sheet & Tube Company case "Just what our forefathers did envision ... must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."<sup>404</sup> There is real substance to their "blueprint," but usually it takes time to uncover. This thesis exemplifies how one can do intensive research, on an extremely narrow area of the Constitution, and still glean very little from the framers' handiwork. Today's governing officials must overcome the urge to exploit the framers' vagaries in order to make quick and easy emendations to our supreme law. If the original conceptual models have proven unworkable, then we should openly recognize this fact and move toward effective fixes. Arguing that the framers really did not mean what they said, or that longstanding practices serve to alter the Constitution, is disingenuous and injurious in the long-run. The war powers arena suffers from these vices.

As previously discussed, Congress's first attempt to fix the war powers--the WPR--has failed. What lies ahead largely depends upon Congress's ability to overcome its institutional indifference to the war powers challenge. As long as America has a Constitution, no fix will work unless it returns to the constitutional basics - the "intent of the framers." This requires good faith compromises and cooperation by the war power partners. Otherwise they risk continuing on their increasingly separate ways with an executive that is ascendant. Few care about the constitutional imbalance created. But more should care about the practical problems which this separation portends for managing foreign relations in the 21st Century. The considerations are twofold: the constitutional and the practical. The recommended basis for fixing the war powers presented in this thesis reflects the same two considerations: integration of the original conceptual model for the war powers--the constitutional--with workable practices that are within the model's parameters--the practical. Hopefully America will not wait to experience another Vietnam War or "imperial President"<sup>405</sup> before fixing its war powers.

1. The War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1982 & Supp. IV 1986) [hereinafter WPR].
2. 50 U.S.C. § 1541(a).
3. George H. W. Bush, Preface to THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES at v (1991).
4. See infra pp. 93-94 and accompanying notes.
5. See infra pp. 91-93 and accompanying notes.
6. The Federal Convention met in Philadelphia, Pennsylvania from 25 May through 17 September 1787. Benjamin F. Wright, Introduction to ALEXANDER HAMILTON ET AL., THE FEDERALIST 1 (Benjamin F. Wright ed., 1961).
7. See infra pp. 30-31 and accompanying notes.
8. See debates on S. Res. 99, 82d Cong., 1st Sess., 97 CONG. REC. 2539, 2571, 2589, 2644, 2652, 2736, 2739, 2769, 2845, 2851, 2862, 2871, 2903, 2910, 2938, 2966, 3008, 3041, 3056, 3062, 3076, 3144, 3161, 3254 (1951); see also H.J. Res. 9. 82d Cong., 1st Sess., 97 CONG. REC. 34 (1951); S. REP. NO. 129, 91st Cong., 1st Sess. (1969); 115 CONG. REC. 17,245 (1969)(National Commitments Resolution). During the Korean conflict Congress attempted to assert more authority over foreign agreement-making processes also, see also S.J.

Res. 130, 82d Cong., 2d Sess. (1952); S.J. Res. 1, 83d Cong., 1st Sess. (1953); S.J. Res. 73, 83d Cong., 1st Sess. (1953); S. REP. NO. 412, 83d Cong., 1st Sess. (1953)(Bricker Amendment).

9. The WPR does not stand alone. During the middle part of the nineteen seventies, congress passed several laws which procedurally affected the executive's rather free management of foreign policy. For example, the senate established a standing committee to oversee Central Intelligence Agency operations, the International Security Assistance and Arms Export Control Act passed in 1976 affected military sales, and 1 U.S.C. § 112(b) (Supp. V 1975) affects the making of executive agreements. See Thomas M. Franck, After The Fall: The New Procedural Framework For Congressional Control Over The War Power, 71 AM. J. INT'L L. 605, 606 (1977).

10. According to the Gallup polls, public support for the conflict in Vietnam began a consistent and precipitous fall in early 1967, i.e., from approximately 52% public support in March 1967 to below 30% in May 1971 (last poll). See MARK LORELL & CHARLES KELLEY, JR., RAND CORPORATION, CASUALTIES, PUBLIC OPINION, AND PRESIDENTIAL POLICY DURING THE VIETNAM WAR 17-28 (1985). See also ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION 25-31 (1991); LOUIS HENKIN,

FOREIGN AFFAIRS AND THE CONSTITUTION 276 (Norton Library 1975)(1972); John C. Cruden, The War-Making Process, 69 MIL. L. REV. 35, 58-66 (1975).

11. President Richard M. Nixon became our 37th President on 20 January 1969. Growing anti-war sentiments probably helped President Lyndon B. Johnson decide not to seek re-election in 1968. His own party was rapidly becoming anti-war, anti-Johnson. See ANTHONY AUSTIN, THE PRESIDENT'S WAR 321-3 (1971); TURNER, supra note 10, at 27-28.

12. Cruden, supra note 10, at 59-60.

13. TURNER, supra note 10, at 28-29.

14. Cruden, supra note 10, at 71; TURNER, supra note 10, at 33-35.

15. Cruden, supra note 10, at 60-61.

16. Id. at 58-59, 59 n.112, 62.

17. Cruden, supra note , at 62 (stating that publication began on 13 June 1971. See generally THE PENTAGON PAPERS (N. Sheehan ed., 1971).

18. Cruden, supra note 10, at 62-63 n.125. See generally ANATOMY OF AN UNDECLARED WAR: CONGRESSIONAL CONFERENCE ON THE PENTAGON PAPERS (Patricia A. Krause ed., 1972)(attacking the dishonesty of several presidential administrations for hiding the true facts

of Vietnam from Congress; concluding that the executive branch cannot be trusted to provide sufficient information to Congress for it to fulfill its constitutional role war-making; recommending that Congress develop dedicated and independent information sources).

19. Cruden, supra note 10, at 63. The Mansfield Amendment was a rider to a 1971 military procurement's bill. The rider urged the president "... to terminate at the earliest practicable date all military operation of the United States in Indochina." When President Nixon signed the bill he declared an intent to ignore the rider since it did not comport with his judgment about termination of the conflict.

20. TURNER, supra note 10, at 29.

21. For a catalogue of problems which beset President Nixon in 1973. See generally Carol L. Thompson, Nixon, Richard Milhous, in THE WORLD BOOK YEAR BOOK 1974: EVENTS OF 1973 422-3 (William Wille et al. eds., 1974); William J. Eaton, Watergate, in Id. at 530-34.

22. The arrogance of President Nixon is typified by his attempts to keep investigatory information from Mr. Leon Jaworski, Watergate's Special Prosecutor. Nixon's position was that the evidence was protected by the "executive privilege." Eventually the United States

Supreme Court ordered release of the evidence by an 8-0 vote, see United States v. Nixon, 418 U.S. 683 (1974). Considering the political and personal damage which this evidence wrecked, the President's desperate position was as understandable as it was damaging to the presidency.

23. Cruden, supra note 10, at 74-5. See also THOMAS F. EAGLETON, WAR AND PRESIDENTIAL POWER 213-25 (1974)(describing the dramatic political effect that the "Saturday Night Massacre" had upon ultimate passage of the WPR).

24. Thompson, supra note 21, at 451.

25. Thompson, supra note 21, at 423.

26. Arthur Schlesinger, Jr., coined this phrase in his authoritative work about the historic accumulation of power in the office of the President, culminating in the abuses of power by President Richard Nixon. See ARTHUR SCHLESINGER, JR., THE IMPERIAL PRESIDENCY at viii (1973). The most telling evidence of President Nixon's complete loss of control and prestige came shortly after passage of the WPR on November 7. On 20 December 1973, the House Judiciary Committee appointed Mr. John M. Doar to prepare evidence of impeachable offenses against the president. Impeachment is such a rare event in United States history only President

Andrew Johnson over the politics of radical reconstruction. Appears that President Nixon resignation prevented the second senatorial impeachment proceeding in our history. Likely that Pres Ford's blanket pardon of Nixon on 8 September 1974, saved him from being convicted of several criminal offenses.

27. H.R. J. Res. 1355, 91st Cong., 2d Sess. (1970). The resolution was primarily procedural and provided for prior consultation and subsequent reporting. The House overwhelmingly passed this resolution by a vote of 288 to 39, see H.R. REP. NO. 93-287, 92d Cong., 2d Sess. 2346 (1972). The Senate failed to act, and the measure died in the 91st Congress.

28. Cruden, supra note 10, at 70-71. In summary, there were two radically different approaches due to differing philosophies: the House approach was to allow presidential use of force unless Congress subsequently dissented; the Senate's version was more restrictive and attempted to foreclose presidential use of force without congressional authorization. War Power Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs, 93d Cong., 1st Sess. 20 (1973)(testimony of Senator Jacob Javits, co-sponsor of the Senate's bill).

29. Since Congress fully participated with the executive branch in initiating the Vietnam War, the theory that the WPR would prevent future Vietnams has been largely discredited. See generally P. EDWARD HALEY, CONGRESS AND THE FALL OF SOUTH VIETNAM AND CAMBODIA (1982)(stating the cautious conclusion that Congress was a war power partner to Vietnam War).

30. Compromise and passage of the hybrid WPR was not without high level dissent. Senator Eagleton, a co-sponsor of the original Senate version, stated: "This is no historic moment of circumscribing the President of the United States insofar as warmaking is concerned. This is an historic tragedy." EAGLETON, supra note 23, at 219.

31. According to Professor Robert Turner the WPR is simply one of nearly 150 reactionary statutes which Congress passed during the mid-1970s. Many targeted perceived executive usurpations of power. Professor Turner believes that most have proven ill advised and ineffective. See ROBERT F. TURNER, THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE at xvi (1983).

32. President Carter's administration apparently accepted the WPR, although his position was "never fully voiced or tested." See Senator Joseph R. Biden,

Jr. & John B. Ritch III, The War Power at a Constitutional Impasse: A "Joint Decision" Solution, 77 GEO. L. J. 367, 392-93 n.98 (1988) (stating the authors' views that the Carter's administration somewhat accepted the WPR).

33. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 171 (4th rev. ed. 1957).

34. See infra pp. 85-87 (for a more thorough discussion about the concept of fluctuating powers).

In the war powers arena the extent of the congressional authority to constitutionally legislate a solution is not absolutely clear. To Professor William Van Alstyne the answer is clear based upon Justice Jackson's famous concurrence in Youngstown Sheet & Tube Company v.

Sawyer, 343 U.S. 579, 634-55 (1951)--Congress affirmatively exercised its power through the WPR, and the President is bound to act consistent with the law. See William Van Alstyne, The President's Powers as Commander-in-Chief Versus Congress' War Power and Appropriations Power, 43 U. MIAMI L. REV. 17, 36-37 (1988).

35. 50 U.S.C. § 1542. The problems with this consultation requirement will be discussed infra p. 16. Arguably, this requirement is not adversative because it is illusory. The text qualifies the

mandatory consultation language with an ambiguous and undefined phrase "in every possible instance." Nor is the legislative history helpful in interpreting what this phrase means. See H.R. CONF. REP. NO. 93-547, 93d Cong. 1st Sess. 2364 (1973)(recognizing that prior consultation will be impossible in certain instances and that the President needs more flexibility, as compared to the House's version which envisioned prior consultation in almost every case, but with a smaller group of congressional leaders).

36. 50 U.S.C. § 1542.

37. 50 U.S.C. § 1543(a).

38. 50 U.S.C. § 1543(c).

39. 50 U.S.C. § 1543(b).

40. See infra pp. 64-80 and accompanying notes.

41. See generally J. Graham Noyes, Cutting the President Off From Tin Cup Diplomacy, 24 U.C. DAVIS L. REV. 841 (1991); Alex Whiting, Controlling Tin Cup Diplomacy, 99 YALE L.J. 2043 (1990)

42. During congressional debates leading to passage of the WPR, problems with the doubtful constitutionality of several provisions were handled by stating that Congress would rely on the good faith of the President to comply with and construe provisions consistent with

the law's overall spirit. See 118 CONG. REC. 11,026 (1972); 119 CONG. REC. 33,859 (1973).

43. Edward S. Corwin, Marbury v. Madison and the Doctrine of Judicial Review, 12 MICH. L. REV. 538, 552 (1914) (discussing the controversial judicial review function first pronounced by Chief Justice John Marshall). See infra pp. 101 and accompanying text.

44. Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) [hereinafter INS v. Chadha]. See infra note .

45. 50 U.S.C. § 1548.

46. Cruden, supra note 10, at 68-70, 77.

47. The plain language of section 2 suggests circumscription of presidential power. Section 2(a), sets forth the general proposition that "collective judgement" is to precede the introduction of American forces into hostilities or imminent hostilities. Section 2(b), provides a constitutional theory for congress's authority to pass laws to facilitate execution of all constitutional powers, whether assigned to Congress or the President. Section 2(c), appears to narrowly define the President's independent powers as Commander-in-Chief. 50 U.S.C. § 1541.

48. H.R. CONF. REP. NO. 93-547, supra note 35, at

2364. See generally TURNER, supra note 10, at 109-110; Cruden, supra note 10, at 80 n.198 (where Representative Clement Zablocki emphasized that the compromise version reflected the House's position that any attempt to define presidential authority would be "constitutionally questionable").

49. Cruden, supra note 10, at 78-79; Biden & Ritch, supra note 32, at 386; John H. Ely, Suppose Congress Wanted a War Powers Act That Worked, 88 COLUM. L. REV. 1379, 1392-5 (1988); TURNER, supra note 10, at 109-10.

50. TURNER, supra note 10, at 109-110.

51. At least one administration, President Carter's, has cited the language in § 1547(d)(1) for the proposition that the WPR did not alter the substantial, independent war powers of the Commander-in-Chief. This occurred within the context of the failed Iran hostage rescue which President Carter directed based solely upon his authority as Commander-in-Chief. Jack B. Patrick, Ten Years After the War Powers Resolution: On the Road Through Lebanon, Grenada, and Central America With a Constitutional Turn at Chadha 12-13 (April 1984)(unpublished manuscript, on file with the University of Virginia Law Library).

52. Cruden, supra note 10, at 80; Thomas M. Franck,

Rethinking War Powers: By Law Or By "Thaumaturgic Invocation"?, 83 AM. J. INT'L L. 766, 772 (1989).

53. 50 U.S.C. § 1542.

54. TURNER, supra note 10, at 110-11 (discussing President Reagan's denial of the constitutional requirement to consult Congress prior to invasion of Grenada); Id. at 109 (discussing President Carters belief that no prior consultation was required with respect the Commander-in-Chief's power to rescue American's from Iran); see also ANN VAN WYNEN THOMAS & A.J. THOMAS, THE WAR-MAKING POWERS OF THE PRESIDENT 145 (1982).

55. 50 U.S.C. §1543(c).

56. See generally CORWIN, supra note 33, at 428 n.41 (providing further references and discussing many of the primary exchanges in this historical debate over executive privilege); ADAM CARLYLE BRECKENRIDGE, THE EXECUTIVE PRIVILEGE; PRESIDENTIAL CONTROL OVER INFORMATION (1974); RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974); STUDY PREPARED BY THE GOVERNMENT AND GENERAL RESEARCH DIVISION OF THE LIBRARY OF CONGRESS, THE PRESENT LIMITS OF "EXECUTIVE PRIVILEGE" (1973), reprinted in id. at 373-86; TURNER, supra note 10, at 76-80. With respect to the last two background sources, both cite the House of

Representative's request for papers regarding Major General St. Clair's failed military expedition as the very first contest over executive privilege within a national security context. The sources come to opposite conclusions with respect to the precedent set by the same incident.

57. TURNER, supra note 10, at 102 n.110; Nixon, 418 U.S. at 712 n.19 (expressly does not reach the issue of executive privilege within the national security context).

58. The President can unilaterally extend this sixty day period for an additional thirty days if he properly "certifies" to Congress the "unavoidable military necessity" of such an extension. 50 U.S.C. § 1544(b).

59. 50 U.S.C. § 1544(b).

60. 50 U.S.C. § 1544(c).

61. Michael J. Glennon, The War Powers Resolution Ten Years Later: More Politics Than Law, 78 AM. J. INT'L L. 571, 577 (1984).

62. See supra note 44.

63. The holding and rationale in INS v. Chadha, as applied to the WPR, may not necessarily defeat use of the WPR's concurrent resolution mechanism--the issue is at least arguable. In INS v. Chadha, the basis for

holding a "legislative veto" unconstitutional was that it circumvented the presentment clause. But within the context of the war powers, a legislative veto is arguably constitutional due to a symmetry analysis. If Congress can initiate war with a declaration passed by simple majorities in the both houses (which arguably need not be presented and cannot be vetoed, See HENKIN, supra note 10, at 32-33, 295 n.5), why should termination of war require presentment and a super majority vote from each house? See Glennon, supra note 61, at 577-78; John N. Moore, Do We Have an Imperial Congress, 43 U. MIAMI L. REV. 139 (1988). See also Martin Wald, The Future of the War Powers Resolution, 36 STAN. L. REV. 1407, 1432-36 (within the context of the WPR, where Congress is not attempting to retain a "legislative veto" over delegated power, INS v. Chadha does not necessarily make section 5(c) unconstitutional); Ely, supra note 49, at 1395-96 (INS v. Chadha is distinguishable since the WPR is an entire "package attempting in concrete terms to approximate the accommodation reached by the Constitution's framers"); Cyrus Vance, Striking the Balance: Congress and the President Under the War Powers Resolution, 133 U. PA. L. REV. 79, 86-87 (1984).

64. Due to serious drafting ambiguities presidents have easily circumvented the requirement to involve

Congress in the decision-making process. From the beginning, the intended nature and extent of the "consultation" requirement has been pondered. See Cruden, supra note 10, at 81-84. Who is to be consulted? If the conference committee's conscious modification is any indication of intent, then the president is to consult the entirety of "the Congress" as opposed to key leaders. Id. at 82. What does consultation mean? Presidents have typically exploited the ambiguities of this term and made whatever they wished satisfy the requirement. At the War Power Hearings few agreed what it meant. Id. 83-4, 84 & n.211-12. Congressmen's responses after the Mayaguez rescue in 1975 confirm that the term "consultation" was not well understood. See Thomas E. Behuniak, The Seizure and Recovery of the S.S. Mayaguez: A Legal Analysis of United States Claims, 82 MIL. L. REV. 41, 61-62 n.78 (1978). To complicate matters, the WPR indicates that the President can forego prior consultation if it is not a "possible instance." 50 U.S.C. § 1542. Who determines this and by what standard?

65. Ely, supra note 49, at 1383, 1400 n.63 (cataloging a host of references dealing with the "consultation" during specific incidents).

66. See generally Glennon, supra note 61, at 571-575 (discussing how the "self-activating mechanism" was intended to work; Professor Glennon is a former legal counsel to the Senate Foreign Relations Committee and worked extensively with WPR issues). Congress apparently envisioned that after initial "consultation," the President would submit a 48 hour report in compliance with section 4(a)(1)--at least in the case of actual or imminent hostilities. This report would then trigger the expedited consideration in Congress and possibly the termination provision of section 5(b). No administration has ever made this full cycle with a Congress. Only once was this procedure belatedly triggered when congress negotiated a "compromise" with President Reagan concerning our Marines in Lebanon. Shortly after recognizing the WPR's applicability and apparently getting what he wanted, President Reagan repudiated his recognition. See Ely, supra note 49, at 1381 & n.9 (reflecting that the compromise was little more than congressional acquiescence).

67. 50 U.S.C. § 1543(a).

68. Biden & Ritch, supra note 32, at 390 (stating that only one report has ever specifically mentioned section 4(a)(1) of the WPR, the report by President Gerald Ford concerning the Mayaguez incident which was submitted

after the event). See also Behuniak, supra note 64, at 46-82 (detailing a chronology of the events in the Mayaguez rescue); compare Id. at 167-170 (reflecting President Ford's report to Congress which states that he was "taking note" of section 4(a)(1) of the WPR, but also states that the military operation was "ordered and conducted pursuant to the President's constitutional Executive power and his authority as Commander-in-Chief of the United States Armed Forces").

69. Patrick D. Robbins, The War Powers Resolution After Fifteen Years: A Reassessment, 38 AM. U. L. REV. 141, 142 (1988). Every so often groups of congressmen seek relief in court, but this alterative has been ineffective. See, e.g., Dellums v. Bush, 752 F.Supp. 1141 (D.D.C. 1990)(Operations Desert Shield and Storm); Lowery v. Reagan, 676 F.Supp. 333 (D.D.C. 1987), appeal dismissed, No. 87-5428 (D.C. Cir. Oct. 17, 1988)(naval escort in Persian Gulf operations); Conyers v. Reagan, 578 F.Supp. 324 (D.D.C. 1984), appeal dismissed, 765 F.2d 1124 (D.C. Cir. 1985)(invasion of Grenada); Sanchez-Espinoza v. Reagan, 568 F.Supp. 596 (D.D.C. 1983), aff'd, 770 F.2d 202 (D.C. Cir. 1985)(alleged covert "war" in Nicaragua); Crockett v. Reagan, 558 F.Supp. 893 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C.

Cir 1983)(per curiam), cert. denied, 467 U.S. 1251 (1984)(military advisors in El Salvador).

70. See Michael J. Glennon, The Gulf War And The Constitution, FOREIGN AFF., Spring 1991, at 84; John W. Rolph, Note, The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm, 43 MERCER L. REV. (forthcoming spring 1992)(manuscript at 34-39, on file with the author)(describing the events leading to President Bush's invocation of the WPR in the congressional authorization and the almost immediate disclaimer).

71. HENKIN, supra note 10, at 103 (predicting such circumvention by presidents due to the ambiguities in wording).

72. See generally Bennett C. Rushkoff, Note, A Defense of the War Power Resolution, 93 YALE L. J. 1330 (1984); Clement Zablocki, The War Powers Resolution: Its Past Record and Future Promise, 17 LOY. L.A. L. REV. 579, 593-95 (1984)(arguing threatened use by Congress provided sufficient political leverage to force presidential compromise); Note, The War Powers Resolution: A Tool for Balancing Power through Negotiation, 70 VA. L. REV. 1037 (1984); Patrick, supra note 51, at 43.

73. War Powers Overhaul Proposal, WASH. POST, May 20, 1988, at A1 (presenting Senator George Mitchell's synopsis of the WPR's failure).
74. Cruden, supra note 10, at 84.
75. Patrick, supra note 51, at 3 (analyzing the WPR's role in military operations in Lebanon, Grenada and Central America).
76. Glennon, supra note 61, at 573.
77. See infra pp. 89-90 and accompanying notes.
78. Professor Glennon discusses one aspect of Congress's problem: its institutional amnesia. Glennon, supra note 61, at 575-577. See also Elliot L. Richardson, Checks and Balances in Foreign Relations, 83 AM. J. INT'L L. 736, 738 (1989)
79. Youngstown, 343 U.S. at 647 (Jackson, J., concurring).
80. See supra note 44.
81. QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS §§ 244-258 (1922)(describing the indispensable concept of informal, extra-constitutional arrangements and understandings, especially between the political branches, which facilitate the development and execution of America's foreign policy).

82. Youngstown, 343 U.S. at 647 (Jackson, J., concurring).

83. Chief Justice John Marshall established some special guidelines for interpreting the Constitution, as opposed to ordinary legislation. In McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819), he stated:

Its [the constitution's] nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which comprise those objects be deduced from the nature of the objects themselves.

Chief Justice Marshall apparently thought there were ultimate parameters on extrapolation which arose from the "great outlines" provided by, and the "important objects designated" in, the text. See also Michael J. Glennon, The Use of Custom in Resolving Separation of Powers Disputes, 64 B.U. L. REV. 109, 121-22 (1984) (stating, "The adaptivist approach ... downplay[s] the primacy of the Constitution as originally conceived; the approach relies instead upon

subsequent practice .... [t]he adaptivist approach prefers a Constitution that is all sail, threatening the very purpose of a written Constitution .... "). The conceptual models provide an anchor for the boat.

84. I am using the term "contemporaneous construction" generically to mean any contemporary writing, spoken word, or action which scholars consider as providing meaning to the text of the constitution. See generally BLACK'S LAW DICTIONARY 318 (6th ed. 1990)(defining the latin term contemporanea expositio -contemporaneous exposition, or construction; a construction drawn from the time when, and under which, the subject-matter to be construed, as a statute or custom, originated). See infra pp. 64-74 and accompanying notes.

85. As James Madison stated at Virginia's ratification convention: "the organization [of the government] ... was, in all its parts very difficult. There was a peculiar difficulty in that of the executive .... That mode which was judged most expedient was adopted till experience should point out one more eligible." 3 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 531 (photo. reprint 1974)(2d ed. 1968) [hereinafter ELLIOT]. See also W. Taylor Reveley, III,

Constitutional Allocation of the War Powers Between the President and Congress: 1787-1788, 15 VA. J. INT'L L. 73, 76-77 (1974).

86. However the next edition of Max Farrand's Records of the Federal Convention will apparently incorporate new materials not originally available to Farrand, Publisher's Note to MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION iii (Yale University Press ed., 1966)(1911) [hereinafter FARRAND]. See also 1 Id. at xxiii-xxiv (discussing other records of the Federal Convention which reportedly exist, but have not been uncovered).

87. The first complete record is by William Jackson. The convention designated Jackson as the official secretary, and he kept the official "Journal." Jackson apparently was not very conscientious in his work. And unfortunately the delegates did not immediately verify or correct his effort. It was eventually published by order of Congress in 1819, after most of the delegates had died or forgotten the specifics. John Q. Adams, then Secretary of State, compiled the Journal. Adams had great difficulties in assembling haphazardly kept notes, despite correspondence with Jackson (who was of little help). Jackson apparently destroyed all of his collateral notes and "loose scraps of paper" shortly after the close of the convention. In the end Adams considered his work a "correct and tolerably clear view

of the proceedings." The Journal reads like "daily minutes" and captures little more than the motions and subsequent votes. 1 FARRAND supra note 86, at xi-xiv.

The most important complete record is based upon James Madison's notes of the proceedings. Madison took notes on the actual debates. Madison "revised" his notes sometime after publication of Jackson's Journal so that the two would be consistent thereby incorporating Jackson's errors. This effectively eliminates the salutary condition of having two independent accounts of certain events. 1 Id. at xvi-xvii. His record was not published until 1840, four years after his death. Thus it was compiled when he was at least 70 years old and a long time after the convention. 1 Id. at xviii & n.20, xix.

Robert Yates kept an account up until the New York delegation left the convention on 5 July. His work, published in 1821 to attack James Madison who was a presidential candidate at that time, did not give "a complete picture of the proceedings, though they threw a great deal of light upon what had taken place and in particular upon the attitude of individual's in the

debates." 1 Id. at xiv-xv.

Several other delegates kept partial notes of the convention.

88. See generally Reveley, supra note 85, at 73 (1974)(examining the intent of the framers and ratifiers with respect to the war powers in great detail). For example, on 17 August 1787, the Convention considered Congress's war powers. For this critical debate Jackson and Madison's records are ambiguous with respect to the specific questions placed before the delegates, are incomplete with respect to the debate, and actually differ with respect to the outcome of the first vote and the number of times the delegates voted. Because the record is unclear, the framers' precise intent in changing "make war" to "declare war" can never be known with certainty. Id. at 103, 106.

89. Cf. WILLIAM WHITING, WAR POWERS AND THE CONSTITUTION OF THE UNITED STATES (10th ed. 1864)(stating that with respect to the interpretation of Article I, Section 8, Clause 1, of the Constitution: "Washington, Adams, Jefferson, Madison, Monroe, Hamilton, Mason, and others, were quite at variance as to the true interpretation.").

90. See generally CLINTON ROSSITER, 1787: THE GRAND CONVENTION passim (1966)(showing the non-static nature of the number of delegates attending the Federal Convention).

91. CHARLES A. BEARD AND MARY R. BEARD, THE RISE OF AMERICAN CIVILIZATION 330 (1945)(quoting General George Washington, President of the Federal Convention: "The constitution that is submitted is not free from imperfections. But there are as few radical defects in it as could well be expected, considering the heterogeneous mass of which the Convention was composed and the diversity of interest that are to be attended to ...."); see also 3 FARRAND supra note 86, at 70.

92. 20 THE WORLD BOOK ENCYCLOPEDIA The United States Constitution 128 (1973 ed. 1973)[hereinafter WORLD BOOK](discussing the constitutional convention generally and stating that James Madison, who won the title of "Father of the Constitution," was the most influential delegate from the standpoint of his speeches, negotiations activities, and attempts to create compromises for the great divisive issues; after Madison, George Washington was influential in an intangible sense, then came Gouverneur Morris, the draftsman).

93. See generally ROSSITER, supra note 90 passim (describing the general process by which the framers arrived at the final text).

94. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 406 (3d ed. 1858)(1833) [hereinafter STORY] (discussing the problem implicit in all uses of contemporaneous constructions, i.e., the lack of common understanding of what the Constitution meant, even amongst the primary actors during the earliest days of the Republic; also arguing that the passage of time decreases the authoritativeness of such constructions).

95. HENKIN, supra note 10, at 3.

96. 2 FARRAND, supra note 86, at 137 (drafted by Edmund Randolph, with emendations by John Rutledge, as the introduction to the first draft of the Constitution: "In the draught of a fundamental constitution, two things deserve attention: 1. To insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accomodated [sic] to times and events. and 2. To use simple and precise language, and general propositions ....").

97. Cf. Eugene V. Rostow, What the Constitution Means

by Executive Power, 43 U. MIAMI L. REV. 188, 188-89 (1988)(reiterating in a modern forum Chief Justice John Marshall's view of the Constitution: an outline for national government).

98. The Age of Enlightenment, sometimes called the Age of Rationalism, began in the 1600's and lasted until the late 1700's. Philosophers of this period emphasized the use of reason to arrive at truth, but this did not mean a resort to purely theoretical thought. There was a reliance on the scientific methodology: experimentation, careful observation, and then rationalizing to form conclusions. Many of the great thinkers of this period significantly influenced the framers--men like Locke, Montesquieu, Rousseau, Voltaire, and Descartes. In the emerging area of politics, Montesquieu had analyzed the experiences from ancient and contemporary societies and had attempted to develop a "science." This was the rudiments of today's political science. See 1 WORLD BOOK The Age of Reason, supra note 92, at 130a-30b.

99. THE FEDERALIST No. 9, at 126 (Alexander Hamilton)(Benjamin F. Wright ed., 1961); Wright, supra note 81, at 86.

100. Douglass Adair, That Politics May Be Reduced to a Science: David Hume, James Madison and the Tenth

Federalist, in FAME AND THE FOUNDING FATHERS 93, 93-100 (1974)(arguing that the framers were generally students of other great philosophers of the Age of Enlightenment -- Bacon and Newton -- and others who were all Scotch such as Francis Hutchinson, David Hume, Adam Smith, Thomas Reid, Lord Kames, Adam Ferguson; discussing the application of "scientific knowledge" to government and politics).

101. THE FEDERALIST No. 85, at 546-7 (Alexander Hamilton)(Benjamin F. Wright ed., 1961).

102. CORWIN, supra note 33, at 7 (discussing the sources for the framers' concept of executive power and mentioning that "Locke, Montesquieu, and Blackstone were common reading to them all ..." without further explanation). In many works this is simply assumed, see TURNER, supra note 10, at 53. See generally CHARLES C. THACH, THE CREATION OF THE PRESIDENCY, 1775-1789 (1922).

103. See supra, notes 98 and 100.

104. Douglass Adair, Experience Must Be Our Only Guide, in FAME AND THE FOUNDING FATHERS, supra note 100, at 107-08, 114-15.

105. Farrand's record of the Convention notes: twenty-six occasions when the delegates directly referred to

ancient Greece, either the city-states or the leagues, and sixteen occasions when the delegates cited ancient Roman situations. 1-2 FARRAND, supra note 86, passim. See also 3 Id. at 87-97 (presenting William Pierce's character sketches of his fellow delegates at the Federal Convention, who noted that several of the most qualified were well versed in the "classics"). See generally THE FEDERALIST No. 70, at 451 (Alexander Hamilton)(Benjamin F. Wright ed., 1961)(typifying Hamilton's propensity to cite examples from the "classics").

106. 2 WORLD BOOK Blackstone, Sir William, supra note 92, at 312 (discussing Blackstone as a prominent English judge, author, and professor; his famous work Commentaries on the Laws of England being the basis for a legal education in England and America in the late 18th Century and providing the colonist their chief source of information about English law).

107. Since the framers were predominantly English, Scottish, or Irish, and they needed a source book for creating a government, they undoubtedly drew upon John Locke's famous work, Two Treatises of Government. See generally BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27-30 (1977 ) (discussing Locke's influence on the framers).

108. Baron de Montesquieu's (real name Charles de Secondat) influence upon the framers is readily seen in what they said during and after the Federal Convention, as well as in the text itself. As one of the first political scientists, Montesquieu's work, The Spirit of Laws (1748), probably proved a valuable textbook for American political writers and thinkers. This massive work was actually a "compendium of the behavioral sciences," representing application of the Newtonian style (scientific methodology and reasoning) to advance the bounds of knowledge, or at least theory, in the fields of politics, economics, law, and sociology. See Adair, supra note 100, at 94-95.

109. See THE FEDERALIST No. 51, at 357 (James Madison) (Benjamin F. Wright ed., 1961)(Madison states that the framers created a "compound republic," a unique idea which the framers derived from the well known principle of republicanism and employed to protect the liberties of the people from tyrannical government); see also THE FEDERALIST No. 47 (James Madison)(Madison's argument against the objection that the proposed Constitution violated the separation of powers maxim because there was a frequent blending of powers between the 3 branches). See infra note 195.

110. THE FEDERALIST No. 14, at 79 (James Madison)(Benjamin F. Wright ed., 1961).

111. See generally ROBERT L. SCHUYLER, THE CONSTITUTION OF THE UNITED STATES: AMERICAN HISTORICAL SURVEY OF ITS FORMATION 90-91 (1923)(denying the framers dependence upon historical antecedents).

112. ERNEST R. MAY, THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF 13-19 (1960)(discussing Parliament's increasing authority with respect to the war powers). But cf. ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 6-13 (1976)(discussing the use of British history to interpret the United States Constitution and concluding that inferences are problematic due to the drastic fluctuations of war and foreign relations powers between the Monarch and Parliament during the three centuries prior to 1787; stating that the real contributions of the British experience were the concepts of separation of powers and counterpoised pressures, i.e., balanced government).

113. See EDWARD KEYNES, UNDECLARED WAR 11-16 (1982); Reveley, supra note 85, at 87-8 (discussing how the framers tended to focus upon the British Monarch of the 17th Century (the Monarch which Locke addressed), rather than the more restrained 18th Century chief executive); 1 FARRAND, supra note 86, at 65 (reflecting Charles Pinckney's dismay over the proposed Virginia Plan which appeared to give the powers of war and peace

to the executive; he states that the new executive would then be a monarch "of the worst kind").

114. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 381-85 (Peter Laslett ed., 1967)(1960).

115. CORWIN, supra note 33, at 7-8, 147; HENKIN, supra note 10, at 297 n.10; KEYNES, supra note 113, 13-14.

116. KEYNES, supra note 113, at 12 (characterizing the primary contributions of the British heritage as the concepts of balanced government, separation of powers, limits on all governmental power, and the rule of law).

117. CORWIN, supra note 33, at 416 n.1 (discussing how the framers consciously choose to ignore the theories of Blackstone, Locke, and Montesquieu with respect to placing the war powers --and foreign relations power - solely in the hands of the executive); KEYNES, supra note 113, at 11-12, 22-30.

This choice comports with the framers' phobia of allowing too much governmental power to be concentrated in any branch or office. THE FEDERALIST No. 48, at 343 (James Madison)(Benjamin F. Wright ed., 1961). Some of the framers had originally proposed a multi-headed executive. The unitarians prevailed, however, the majority of framers used every possible occasion to check the executive powers with legislative powers.

HENKIN, supra note 10, at 33. "If one could not change human nature, one could at least counteract vice with vice, power with power, and ambition with ambition . . . ." KEYNES, supra note 113, at 16.

This line of reasoning also undermines the timeless argument that the Article II, section 1, clause 1, i.e., the "vesting clause," is some vast, unrestricted reservoir of executive power. See KEYNES, supra note 113, at 20-1 (arguing that Hamilton, Madison, Charles Pinckney, and the other framers who expressed their views on the presidency defined the executive power in a limited sense, such as for the administration of government); 1 FARRAND, supra note 86, at 65-66 (reflecting the sentiments of James Wilson during discussion of the Virginia Plan which provided for a unitary executive, "He did not consider the Prerogative of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war and peace and c."). Accord 1 Id. at 65 (reflecting the sentiments of John Rutledge during discussion of the Virginia Plan, "[He] was not for giving [the executive] the power of war and peace."). 118. See Reveley, supra note 85, at 88 & n.42, 88-9 & n.43 (discussing the prevailing view that a Monarch

would engage the nation in military adventurism for his own personal reasons independent of the voice of the people).

119. Conventional wisdom, represented by Locke and other theorists, posited that the executive branch should handle foreign and military matters because of the institutional advantages of the executive over the legislative branch, i.e., speed secrecy, dispatch. See CORWIN, supra note 33, at 416-18 n.1; HENKIN, supra note 10, at 297 n.10; WRIGHT, supra note 81, at 141-43, 363-65. The framers understood the inefficiencies they were introducing and tried to mitigate the adverse effects by creating a hybrid form of government.

120. Charles J. Cooper, What the Constitution Means by Executive Power, 43 U. MIAMI L. REV. 165, 168 n.17 (1988).

121. King George III, unlike his two German ancestors, was born in England. He initially regained some of the traditional monarchical influence and authority lost to Parliament and the cabinet by his predecessors. He employed a policy of force against the American colonies which failed. King George III was the last Monarch to have a direct role in British government.

8 WORLD BOOK Great Britain, supra note 92, at 334.

But obviously Parliament and the king's cabinet shared some guilt with the Monarch. Reveley, supra note 85, at 88 n.43 (discussing the framers' knowledge that by the late 1770's Parliament constrained most monarchical prerogatives and offering an explanation for the framers frequent attacks on kingly prerogatives); Id. at 88, n.39 (arguing that the colonists tempered their aversion to the presidency, that somewhat resembled a Monarch, with the awareness that Parliament was at least partially responsible for the colonial difficulties with Britain).

122. The Declaration of Independence para. 5 (U.S. 1776).

123. Id. at paras. 16, 17, 19, 20, 28, 29, 30. See also MAY, supra note 112, at 9 (concerning the colonists' distasteful experiences with colonial British Commander-in-Chiefs).

124. CORWIN, supra note 33, at 5-6.

125. See BEARD & BEARD, supra note 91, at 297-309 (discussing how the revolutionary zeal in 1775-1776 led to a general repudiation of the British Crown and all it represented, and gave rise to a populism which ultimately lead to the period of "legislative despotism").

126. See KEYNES, supra note 113, at 17; Id. at 17 n.44 (discussing the aberrant Pennsylvania constitution which had an assembly, an executive council and a president); Id. at 17-8 (discussing how New Hampshire and Massachusetts which both had express separation of power provisions fell into the dominance of the legislature).

127. Id. at 18 (discussing how Thomas Jefferson coined the phrase "legislative despotism" to describe the situation and explaining that the framers believed that despotism from any source, whether the Monarch or popular assembly, was anathema to free government this was key in the framers decision to create a government of carefully and expressly limited powers).

128. 1 STORY, supra note 94, at 181-185 (discussing the major defects in the Articles of Confederation). See also 1 FARRAND, supra note 86, at 18-19 (Edmund Randolph's enumeration of the serious national problems under the Articles of Confederation mentioned before presenting the Virginia Plan at the Convention); see also Letter from George Washington to Thomas Jefferson (May 30, 1787), in 11 WRITINGS OF GEORGE WASHINGTON 158-159 (W.C. Ford ed. ), reprinted in 3 Id. at 31 (lamenting the dire situation under the Articles of Confederation and stating "[F]or the situation of the general government, if it can be called a government,

is shaken to its foundation, and liable to be overthrown by every blast. In a word, it is at an end; and, unless a remedy is soon applied, anarchy and confusion will inevitably ensue.").

129. See Reveley, supra note 85, at 93-5.

130. Reveley, supra note 85, at 91; War-Power Legislation, 1971: Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Senate Comm. on Foreign Relations, 92d Cong., 1st Sess. 77-8 (1977)(remarks of Richard B. Morris); Bennett N. Hollander, The President and Congress - Operational Control of the Armed Forces, 27 MIL. L. REV. 49, 51, 53-4 (1965)(discussing how Continental Congresses tried to manage military operations through a number of boards and subcommittees who were assigned specific areas of responsibility, e.g., mobilization, tactics, strategy, how the efforts proved ineffective and eventually vast led to the delegation of vast powers to George Washington as commander-in-chief).

131. Shays' Rebellion in Massachusetts was relatively fresh in the framers' minds as they arrived in Philadelphia. This small insurrection served to underscore the urgency of need for a stronger national government. The rebellion is referenced six times during debates at the Convention. 1 FARRAND, supra

note 86, at 18, 48, 318, 406, 423; 2 Id. at 317, 332n.

132. THE FEDERALIST No. 74, at 473 (Alexander Hamilton)(Benjamin F. Wright ed., 1961); see generally THE FEDERALIST No. 23 (Alexander Hamilton); 2 FARRAND, supra note 86, at 318-19.

133. Letter from James Madison to Mr. Edward Everett (August 1830), reprinted in 1 STORY, supra note 94, at 277.

134. U.S. CONST. art. I, § 8, cl. 11.

135. U.S. CONST. art. II, § 2, cl. 1. Many scholars now claim that the clause which vests the "executive power" in the President is also a broad grant of war power. U.S. CONST. art. II, § 1. See supra note 117. This argument apparently originated with Alexander Hamilton, when he wrote as Pacificus in his written debates with Helvidius (Madison) concerning George Washington's power to proclaim neutrality. Hamilton's argument gained little ground with the framers. The Civil War gave real vitality to Hamilton's theory. Cruden, supra note 10, at 46. First, this argument is inconsistent with the principle of limited government. The logic clearly may be used to justifies expansion of executive's powers far beyond the specifically

enumerated powers within the Constitution. See CORWIN, supra note 33, at 3-4. Arguably, there is no need for such a broad interpretation of the vesting clause. Congress, through the expansively interpreted "necessary and proper clause," is capable of providing for any war powers contingency or delegating such powers to the executive to act at his discretion. Second, this argument is inconsistent with the principle of the separation of powers to the extent it justifies expansion of the executive's power into the war powers granted to the legislative branch. See WRIGHT, supra note 81, at 95-6 (arguing that the three constitutional vesting clause merely implies adoption of the doctrine of separation of powers and that these clauses "cannot, therefore, be made the basis of powers other than essentially inherent power" for the executive and the judicial departments). But see 1 STORY, supra note 94, § 424.

Another common argument is that the "shall take care" clause when read in conjunction with the "Commander in Chief" provision, grants the executive almost supreme control of the war powers. U.S. CONST. art. II, § 3. President Abraham Lincoln introduced and developed this argument during his presidency. See generally CORWIN, supra note 33, at 23-4, 227-234.

Civil War and subsequent Reconstruction practices should be considered a special category of precedents, for they arose out of a special context. See Biden & Ritch, supra note 32, at 378. See generally HENKIN, supra note 10, at 54-56 (stating that originally "the principle purport of the clause, no doubt, was that the President shall be a loyal agent of Congress to enforce its laws;" discussing the growth of this clause as a source of presidential power based upon subsequent practices); Id. at 157-59 (discussing how modern presidents have used the "take care" clause to expand the executive's decisional war powers with respect to determining and enforcing international obligations by deploying forces to foreign nations pursuant to defense treaties and less formal agreements).

136. See infra pp. 91-95 and accompanying notes.

137. Two of the Constitution's grand objectives were to "insure domestic Tranquility, provide for the common defence." U.S. CONST. pmbl. The framers apparently believed that to quell insurrections at home, repel foreign invasions, control the Indian tribes, and protect commerce (primarily with the U.S. Navy), there meager treatment of the war powers had covered all the major issues. See THE FEDERALIST NO. 23 (Alexander Hamilton)(indicating that all the constituent elements

for providing an effective "common defence" were expressly stated in the text).

138. I use this term to describe the legislature's war powers function which is generally twofold: first, to decide whether to authorize military force or use some other instrument of foreign relations; and second, to predetermine parameters, if any, on the use of that force. These may be broadly categorized as policy decisions.

139. 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.02 (5th ed. 1992).

140. 1 STORY, supra note 94, § 400.

141. See Reveley, supra note 85, at 89-90 (arguing that based upon their knowledge of the great warfare theorist of Europe, e.g., Grotius, Pufendorf, Vattel, and Burlamaqui, the framers and ratifiers knew that "war might be limited or general, that marque or reprisal were a means of waging limited hostilities, and that even major conflict generally began without prior declaration" in 18th Century Europe). See also THE FEDERALIST No. 25, at 211 (Alexander Hamilton) (Benjamin F. Wright ed., 1961)("[T]he ceremony of a formal denunciation of war has of late fallen in disuse.").

142. HENKIN, supra note 10, at 80-81 (stating that this view is "without foundation").

143. 1 STORY, supra note 94, § 428.

144. See supra p. 30 and accompanying notes.

145. 1 FARRAND, supra note 86, 292 (quoting Alexander Hamilton's proposal for the executive presented to the Convention on June 18, he uses both terms interchangeably).

146. 2 FARRAND, supra note 86, at 318 (quoting Charles Pinckney from a Convention debate on August 17).

147. Compare U.S. ART. OF CONFED. art. VI (using the term "declaration of war") with Id. at art. IX (using the term "determining on ... war" to describe the same factual event).

148. See 6 THE WRITINGS OF JAMES MADISON 148 (G. Hunt ed. 1906)(expressing Madison's view in 1793 that it is necessary to carefully distinguish the power that a Commander-in-Chief has "to conduct a war" from the power to decide "whether a war ought to be commenced, continued, or concluded."). Cf. Donald King & Arthur Leavens, Curbing the Dog of War: The War Powers Resolution, 18 HARV. INT'L L. J. 55, 57-65 (1977). See generally Note, War-Making Power, 81 HARV. L. REV. 1771, 1772-74 (1968)(discussing the difficulty in interpreting what an outdated concept means in today's

context and concluding that "declare war" means "the power to initiate war").

149. Thomas Jefferson's implied this concept in his famous "Dog of War" quote. Though not a framer, his understanding was that the text of the Constitution took the decision for war from the executive -- where the objectionable concept of prerogative would have placed it -- and transferred it to the legislative branch.

We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.

Letter from Thomas Jefferson to James Madison (Sep. 1789), in 15 THE PAPERS OF THOMAS JEFFERSON, at 397 (J. Boyd ed., Princeton University Press ed. 1961).

150. See Note, supra note 148, at 1774-75 (discussing what the framers' term "war" means in a modern context and concluding that it should be defined in terms of the two rationales for originally placing "war" in

Congress's control, i.e., war involves great risks to the nation in both economic and social terms, and acts of war may involve global consequences). See generally FRITZ GROB, THE RELATIVITY OF WAR AND PEACE (1949); Philip C. Jessup, Should International Law Recognize an Intermediate Status Between Peace and War?, 48 AM. J. INT'L L. 98 (1954).

151. See Rostow, supra note 97, at 193-94 (interpreting "declare war" in terms of the international law distinction which distinguishes general from limited wars).

152. KEYNES, supra note 113, at 36-37. But see, HENKIN, supra note 10, at 53-54. See infra pp. 80-83 and accompanying notes.

153. The definition of "war" which the framers were probably most familiar with does not mention a formal "declaration" of war, only authorization by the "sovereign power."

War - a contest between nations or states, carried on by force, either for defense, or for revenging insults and redressing wrongs, for the extension of commerce or acquisition of territory, or for obtaining and

establishing the superiority and dominion of one over the other. These objects are accomplished by the slaughter or capture of troops, and the capture and destruction of ships, towns and property. Among rude nations, war is often waged and carried on for plunder. As war is the contest of nations or states, it always implies that such contest is authorized by the monarch or the sovereign power in the nation. When war is commenced by attacking a nation in peace, it is called an offensive war, and such attack is aggressive. When war is undertaken to repel invasion or the attacks of an enemy, it is called defensive, and a defensive war is considered as justifiable. Happy would it be for mankind, if the prevalence of christian principles might ultimately extinguish the spirit of war, if the ambition to be great, might yield to the ambition of being good.

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154. The exception to this general grant allowed the President, as the Commander-in-Chief to repel sudden invasions of the nation, see infra pp. 48-49 and accompanying notes.

155. Reveley, supra note 85, at 89 & n.46.

156. Cf. HENKIN, supra note 10, at 100 (discussing that trying to delineate between "war and lesser uses of force is often elusive," thus modernly it is not a workable standard). See generally Harry W. Jones, The President, Congress, and Foreign Relations, 29 CAL. L. REV. 565, 579-80 (1941)("short of war" is not an effective constitutional standard).

157. HENKIN, supra note 10, at 318 n.2.

158. Marque and reprisal were well known terms to the framers. According to a contemporary dictionary, the authorizations could apply to land warfare as well.

Reprisal - The seizure or taking of any thing from an enemy by way of retaliation or indemnification for something taken or detained by him. .... "Letters of marque and reprisal" - a commission granted by the supreme authority of a state to a subject, empowering him to pass the frontier [marque,] that is, enter an enemy's territories and

capture the goods and persons of the enemy,  
in return for goods or persons by taken by  
him.

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Marque - (1) Letters of marque are letters of  
reprisal; a license or extraordinary  
commission granted by a sovereign of one  
state to his subjects, to make reprisals at  
sea on the subjects of another, under  
pretense of indemnification for injuries  
received. Marque is said to be from the same  
root as marches, limits, frontiers, and  
literally to denote a license to pass the  
limits of a jurisdiction on land, for the  
purpose of obtaining satisfaction for theft  
by seizing the property of the subjects of a  
foreign nation. (2) A ship  
commissioned for making reprisal.

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159. See Ritch & Biden, supra note 32, at 375 (discussing the significant Supreme Court cases resulting from the execution of letters of marque which found that all wars, both perfect (formal/full-scale) and imperfect (limited), were comprehended within the constitutional definition of "war"). See also Richard M. Pious, Presidential War Powers, the War Powers Resolution, and the Persian Gulf, in THE CONSTITUTION AND THE AMERICAN PRESIDENCY 195, 198 (Martin L. Fausold et al. eds., 1991).

160. See U.S. ART. OF CONFED. arts. VI, IX.

161. 1 FARRAND, supra note 86, at 322, 326.

162. Compare THE FEDERALIST No. 44, at 318 (James Madison)(Benjamin F. Wright ed., 1961)(under the Articles of Confederation the states had limited power to issue letters of marque and reprisal, to justify granting this power solely to the national Congress Madison pointed to "the advantages of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible"); with U.S. CONST. art. I, § 10 (prohibiting the states from issuing letters of marque or reprisal). Clearly, Madison felt that national issuance of these letters was important since the nation would be held

internationally responsible for any uses of force pursuant to them. This was matter with foreign relations implications which the national government, specifically Congress, was to determine.

163. KEYNES, supra note 113, at 37 (mentioning that these rules pertained to both public and private ships). To some extent these rules of capture operated as rules of engagement for the public ships. See also Pious, supra note 159, at 197 (comparing it to a modern day anti-terrorist capability).

164. 2 FARRAND, supra note 86, at 318-320 (presenting all available accounts of this one and only debate/discussion of the war powers; James McHenry's brief note is not helpful; Madison's version is the most helpful, but it somewhat conflicts with Jackson's version). See supra note 87.

165. The members of the Committee of Detail were John Rutledge (Chairman), Edmund Randolph, James Wilson, Nathaniel Gorham, and Oliver Ellsworth, see C. EDWARD QUINN, THE SIGNERS OF THE CONSTITUTION OF THE UNITED STATES 108-109 (1987)(discussing the organization of the Federal Convention and giving a brief biographical sketch on each of the 39 signers).

166. 2 Id. at 181-82.

167. 2 Id. at 318 (discussing how Charles Pinckney thought that vesting this power in the Senate would be better since it would have the expertise in foreign affairs, would already have the power to make peace by treaty [this is implied], and the House would be too slow and too large for such deliberations; also discussing how Pierce Butler made the only recorded proposal that the power to make war be placed with the President, since the Senate suffered from the same institutional shortcomings as the House). After some unrelated discussions the record reflects an apparently misplaced entry "Mr. [Elbridge] Gerry never expected to hear in a republic a motion to empower the Executive also to declare war." After which the record returns to an unrelated discussion. 2 Id. at 318. This exemplifies problems with interpreting the record. See infra pp. .

168. 2 Id. at 318.

169. 2 Id. at 319 (appearing only in Madison's record as a margin entry to the final vote).

170. See also HENKIN, supra note 10, at 52 (stating "the power of the President to use the troops and do anything else necessary to repel invasion in beyond question"); Id. at 305 n.38 (citing as authority -- custom, early statutory recognition, and early judicial

interpretation -- all consistent with this view). The tough issues lies in the area of the President's constitutional authority for conducting military operations preemptively when he anticipates imminent invasion. Id. at 52.

171. I use this term to describe the executive's war powers function which is generally broad discretion to use military force to obtain the stated objectives within the parameters set by the legislature, This may be broadly characterized as operational decisions.

172. U.S. CONST. art. II, §2, cl. 1.

173. See CORWIN, supra note 33, at 228-9 (proposing that Abraham Lincoln was the first president to construe the Commander-in-Chief clause broadly and use it aggressively); see also HENKIN, supra note 10, at 50-1. See generally CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF (R. Longaker rev. ed. 1976)(presenting an historical analysis of the powers).

174. See supra pp. 41-42 and accompanying notes.

175. Cooper, supra note 120, at 174-75 (discussing the framers' possible understanding of the Commander-in-Chief clause based upon their experiences in the states and in drafting such provisions for state constitutions). The definition of terms closely related to Commander-in-Chief, which the framers

probably knew and used, show that the Commander-in-Chief is clearly involved in the operational aspects only.

Commander - a chief; one who has supreme authority; a leader; the chief officer of an army, or of any division of it. The term may also be applied to the admiral of a fleet, or of a squadron, or to any supreme officer; as the commander of the land or of the naval force; the commander of a ship.

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Chief - a commander; particularly a military commander; the person who heads an army; equivalent to the modern terms, commander or general in chief, captain general, or generalissimo.

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176. The initial Virginia Plan proposed that the executive was to "enjoy the Executive rights vested in Congress by the Confederation," 1 FARRAND, supra note 86, at 21. Several delegates understood the implications of this vague statement and expressed fear that this might assign to the new executive the powers of "war and peace," 1 Id. at 64-65 (expressing the fears of Charles Pinckney and John Rutledge). The amended proposal dropped the vague grant of power and the revisors substituted only a few express powers; the revisors did not address war and peace. 1 Id. at 230.

177. Generally, Hamilton's vision for a strong national government and a powerful executive branch was unacceptable to the framers and the public. See Reveley, supra note 85, at 99-100. The forward-looking Hamilton may have envisioned the future role of our nation in world affairs and the need to project force. See generally THE FEDERALIST Nos. 11, 24, at 208 (Alexander Hamilton)(Benjamin F. Wright ed., 1961).

178. 1 FARRAND, supra note 86, at 292; see also 3 Id. at 622, 625 (presenting Hamilton's draft of the whole Constitution which was never formally presented at the

Convention, but which was given to Madison near the close); see also THE FEDERALIST No. 74 (Alexander Hamilton)(Benjamin F. Wright ed., 1961)(presenting, perhaps disingenuously, Hamilton's concept for the Commander-in-Chief). Contra Robert Yates' version which stated that Hamilton's proposal gave the executive "the sole discretion of all military operations." 1 Id. at 300.

179. The Charles Pinckney proposal was referred to the Committee of the Whole, but never debated. He also designated the executive as "Commander in Chief of the army & navy" without further explanation. Pinckney gave the Senate the power to "declare War." 1 FARRAND, supra note 86, at 23; 3 Id. at 599-600.

180. Not all proposals recommend a unitary executive. In fact the New Jersey Plan left the exact number of executives open to determination by the Convention. 1 Id. 244.

181. 1 Id. at 244.

182. 1 Id. at 88-9, 97.

183. The "Committee of the Whole" refers to the entire membership of the Convention when operating as a deliberative, decision-making body. QUINN, supra note 165, at 108..

184. 2 FARRAND, supra note 86, at 69-70 (suggested further guidance, but apparently decided that this was for the Committee of Detail to determine); 2 Id. at 132 (reflecting no mention of the war powers in the "resolutions" or guidance from the Committee of the Whole). For a listing of the members on the Committee of Detail see supra note 165.

185. 2 Id. at 157-58 (showing that relevant portions of the New Jersey Plan and Pinckney's proposal found with other Committee of Detail working documents).

186. 2 Id. at 137 n.6 (explaining Farrand's system of marking); 2 Id. at 145 (displaying Randolph's amended outline).

187. 1 Id. at 65.

188. 2 Id. at 185.

189. 2 Id. 422 (reflecting Jackson's version); 2 Id. 426 (reflecting Madison's version which notes that after some discussion the draft was changed to make the President the Commander-in-Chief of the states' militias only when called into federal service by Congress). The major points of controversy focused upon a fear of "standing armies" and federal use of the states' militias. Hamilton spent the better part of four Federalist Papers trying to assuage the public's

and states' fears. See generally THE FEDERALIST Nos. 25, 26, 28, 29 (Alexander Hamilton)(Benjamin F. Wright ed., 1961). If length of treatment in The Federalist Papers is any indication of the controversy surrounding the issue, then the war power model presented little difficulty. Hamilton addresses the Commander-in-Chief clause in the first paragraph of one paper. See Id. No. 74, at 473. In part of a paragraph in another paper. See Id. No. 69, at 446. Hamilton mentions the Commander-in-Chief clause briefly in three other papers. See Id. Nos. 70, 72, 75.

190. THE FEDERALIST No. 26, at 215 (Alexander Hamilton)(Benjamin F. Wright ed., 1961)(arguing that based upon British experience, placing the existence and control of a standing army in the hands of Parliament was a sufficient safeguard to liberties).

191. See MAY, supra note 112, at 3-19. Apparently several framers and ratifiers were afraid that the executive as Commander-in-Chief would not just control military operations, but would physically command the operations. A very commonly debated issue, especially at the states' ratifying Conventions, was whether to propose an amendment to the constitution which would prevent the President from personally commanding the troops in the field. See 1 FARRAND, supra note 86, at 244; 3 Id. at 217-18. Reveley, supra note 85, at 113.

This concept is so ridiculous to modern commentators that the significance of these debates is not fully appreciated.

192. See infra pp. 75-79 and accompanying notes.

193. THE FEDERALIST No. 47, at 336 (James Madison) (Benjamin F. Wright ed., 1961).

194. THE FEDERALIST No. 48, at 343, 345 (James Madison)(Benjamin F. Wright ed., 1961). The aspect of the system which makes it a unique experiment is that the check was primarily unilateral. The legislative branch could effectively check the executive, but the converse was not true. Under the classic theory of checks and balances, each separate branch must be able to effectively check the other and thereby protect its powers. Id. No. 51, at 356. But even Madison recognized that perfect bilateralism in the system was impossible, since "In a republican government, the legislative authority necessarily predominates." Id. No. 51 at 356.

Although the war power model apparently received little criticism, the treaty-making conceptual model, which was conceptually similar, must have been controversial. In one Federalist Paper Hamilton defends against the charge that treaty-making under the

new government violates the separation of powers maxim. Hamilton refers to the binding of the executive to the Senate as a "intermixture of powers." He then argues that the peculiar nature of the treaty power makes this mixing proper. Essentially the functions have been divided and assigned to the branch with the relative institutional advantage: the executive possesses the qualities to be "the most fit agent in those transactions" and Senate participation is merited because of the "vast importance of the trust, and the operation of treaties as laws." Hamilton then goes on to discuss how the treaty-making power in either the executive alone, the Senate alone. or the House, would be dangerous or institutionally less satisfactory. He calls the treaty-makers "a distinct department." THE FEDERALIST No. 75, at 476-78 (Alexander Hamilton)(Benjamin F. Wright ed., 1961). Nearly the same analysis could have been presented for the war power model, apparently such a defense was not necessary.

195. To the extent that the framers were as knowledgeable as Hamilton, they would have understood the specific strengths and weaknesses of the legislative and executive branches respectively. See generally THE FEDERALIST No. 70, at 451-52, 454 (Alexander Hamilton)(Benjamin F. Wright ed., 1961).

196. The framers also granted the legislative branch all of the related war powers, e.g., raising and supporting an army and navy, issuing governing rules, calling forth the militia (originally considered a more important source of military power than a standing army), managing the militia. The President received only one related war power: command of the militia when federalized by congressional decision. As John Jay explained, consolidation into one large army under unified command was the more efficient method. See THE FEDERALIST No. 4, at 103 (John Jay)(Benjamin F. Wright ed., 1961). See also KEYNES, supra note 113, at 45 (arguing that vesting the related war powers, especially the power to make rules governing the armed forces, was yet another means of distinguishing the executive from a British monarch with prerogative).

This was consistent with the framers methodology. All these related powers functionally belonged to the legislative branch for they all involved decision-making. Surprisingly, the training and appointment of officers for the militia, which would have naturally been executive in nature was left expressly to the states. U.S. CONST. art. I, § 8, cl. 16. This comports with the pattern to derogate the executive power whenever possible. In many respects the militia

was to meant to be the private army of the states which had retained some undefined quantum of sovereignty.

197. E.g., HENKIN, supra note 10, at 33; THE FEDERALIST No. 77, at 489 (Alexander Hamilton)(Benjamin F. Wright ed., (1961) (stating, "[T]he executive department, which, I have endeavored to show combines, as far as republican principles will admit, all the requisites to energy."). Strict efficiency would have mandated giving the bulk of an undivided war power to the executive. This was unacceptable under the framers' set of values, so it was not done. Clearly, efficiency and effectiveness in government were intentionally subordinated to the preservation of liberties. See also 1 FARRAND, supra note 86, at 125 (Pierce Butler stating at the Convention, "We must follow the example of Solon who gave the Athenians not the best Govt. he could devise, but the best they wd. receive.").

198. One recognized exception is the president's power to repel sudden invasion. In this limited area the President exercises both the decisional and operational war power, at least until military stabilization of the situation. See supra pp. 48-49. See infra p. 70 and accompanying notes.

199. See supra note 33.

200. 1 STORY, supra note 94, § 405. See also Id. at § 455 (reiterating this point, "But the most important rule, in cases of this nature is, that a constitution of government does not, and cannot, from its nature, depend in any great degree upon mere verbal criticism, or upon the import of single words[] ... but unless it stands well with the context and subject-matter, it must yield ... it is an instrument of government we are to construe; and, as has been already stated, that must be the truest exposition, which best harmonizes with its design, its objects, and its general structure.").

201. Legislative predominance was not just a concept, but was reality during the earliest administrations. Cruden, supra note 10, at 45-46.

202. See THE FEDERALIST Nos. 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77 (Alexander Hamilton).

203. Id. No. 77, at 489. Hamilton clearly understood the framers' original conceptual model for the war powers and its implications for national security. Given his philosophy, he was obviously less than optimistic about the experiment. In the context of defending the national government's power to tax in order to provide for the "common defence," he stated:

Admitting that we ought to try the novel and absurd experiment in politics, of tying up the hands of government from offensive war, founded upon reasons of state; yet, certainly, we ought not to disable it from guarding the community against the ambition or enmity of other nations.

THE FEDERALIST No. 34, at 250 (Alexander Hamilton)(Benjamin F. Wright ed., 1961).

204. THE FEDERALIST No. 48, at 344 (James Madison)(Benjamin F. Wright ed., 1961). See also HENKIN, supra note , at 33-4.

205. See supra notes 167 & 178 (referencing Hamilton and Pinckney's proposals).

206. E.g., HENKIN, supra note 10, at 31-33.

207. Apparently President George Washington interpreted the treaty "advice and consent" phrase as empowering the Senate to provide considerable inputs to proposed treaties before and during negotiations. The actual negotiations being clearly left to the executive and his agents. In 1789, he tried to obtain Senatorial guidance for his negotiators concerning a proposed treaty with Southern Indians tribes. He went to the

Senate with his Superintendent of War, Henry Knox, in tow. Open and frank discussion was impossible with the Washington present and the proposals were too complex even for the Senate to take up without preparation.

The Senate did there best to debate his proposals, but the action was eventually postponed. Washington got angry and it was an awkward situation for all involved. Thus Washington's first attempt at personal "advice and consent" ended in failure and began a series of

unfortunate precedents. See FORREST MCDONALD, THE PRESIDENCY OF GEORGE WASHINGTON 27-8 (1974); see also Gerhard Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 WM. & MARY L. REV.

211, 227 (1989) (Washington never again attempted personal "advice and consent," but he continued to seek Senatorial inputs to treaties, as opposed to mere approval, in writing); see also Monroe Leigh, A Modest Proposal For Moderating the War Powers Controversy (30 March 1988)(unpublished manuscript and basis for address at conference sponsored by the ABA's Standing Committee on Law and National Security, on file with the George Mason Law School) (describing the final episode in Washington's attempt to receive Senatorial "advice" in 1794; Washington sought the Senate's advice before dispatching John Jay, the Senate refused to advise in advance and Washington vowed he would never

again seek Senate advice in advance). See generally THE FEDERALIST No. 64 (John Jay); Arthur Bestor, "Advice" from the Very Beginning, "Consent" When the End Is Achieved, 83 AM. J. INT'L L. 718 (1989).

Modernly, presidents are more likely to present treaties as fait accomplis for Senate concurrence.

208. The executive could also initiate policies and laws by way of proposal. U.S. CONST. art. II, § 3, cl.

1. Because of special access to information through his diplomatic corps, the President was also in a position to initiate and recommend the negotiation of treaties.

209. U.S. CONST. art. II, § 3 ("he shall take Care that the Laws [which included approved treaties] be faithfully executed").

210. Unquestionably the treaty-making powers followed a somewhat different pattern than normal legislation. See supra note 194. This uniqueness has sometimes led scholars to call the treaty-makers the "fourth department [branch]." See WRIGHT, supra note 81, §§ 74-85. The treaty power, like the war power, was functionally sub-divided and assigned to the institutionally most capable branch, or partial branch, subject to the constraints of republican principles.

211. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)(opinion by Chief Justice John Marshall establishing the concept of "judicial review").

212. Reveley, supra note 85, at 86, 126 (explaining that throughout the ratification process newspapers and circulating pamphlets continuously interpreted the text of the proposed constitution and presented arguments; The Federalist Papers represent the most substantial and influential efforts, also they more closely reflect the framers' understandings than other contemporary works). See generally ALEXANDER HAMILTON ET AL., ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788 (Paul L. Ford ed., 1892)(presenting a collection of other ratification pamphlets and articles).

213. Reveley, supra note 85, at 86 & n. 35, 126 n.178 (referencing additional materials concerning the actual impact of this effort).

214. There are 85 essays. Approximately 51 were written by Alexander Hamilton who attended more than half of the convention, 29 were written by James Madison who attended the entire convention, and 5 were written by John Jay who was an experienced statesman though not a convention delegate. Benjamin F. Wright, Introduction to ALEXANDER HAMILTON ET AL., THE

FEDERALIST 7-10 (Benjamin F. Wright ed., 1961)(discussing additional problems with determining the exact authorship of these papers).

215. Id. at 77.

216. Id. at 11. This was clearly an uphill struggle since the New York delegates officially left the Philadelphia convention (Hamilton later returned on his own) and allied themselves with New York's popular Governor Clinton to oppose the proposed draft. Almost immediately the writing campaign against ratification began. When the New York ratification convention finally met on June 17, 1788, the count was 19-46 against ratification. Id. at 1-4.

217. Hamilton believed in an extremely strong, national government with a relatively powerful unitary executive. At the convention Hamilton's ideas were routinely too radical for the other delegates, but in his Federalist Papers he presents a much more palatable interpretation of the text. This may explain why Hamilton "appears" to change his philosophy and interpretation of the constitution, especially as a member of Washington's cabinet and in the famous Pacificus-Helvidius exchange. HENKIN, supra note 10, at 41 (unnumbered footnote), 43; see also Id. at 304, n.34 (where Hamilton appears to change his views on the

scope of the Commander-in-Chief clause); see also John Q. Adams, Eulogy on James Madison 46 (1836)(noting that during the Pacificus-Helvidius exchanges that Madison's most forceful arguments were filled with quotations from Hamilton's works in The Federalist Papers).

218. E.g., THE FEDERALIST Nos. 24, 25, 26, 27, 28, 29 (Alexander Hamilton)(Benjamin F. Wright ed., 1961).

219. Hamilton devotes an entire paragraph or a good portion of a paragraph to the Commander-in-Chief twice; the other three discussions are very brief. See Id. Nos. 69, 70, 72, 74, 75. See Reveley, supra note 85, at 128-30, 129 n.190 (quoting all the Commander-in-Chief discussions).

220. See THE FEDERALIST No. 41 (James Madison). In this paper Madison concludes that the power to declare war is obviously necessary. Apparently there was little public controversy over this power. In Hamilton's defense of a national, "standing" Army, he argues that the people need not fear such an army because "the whole powers of the proposed government is to be in the hands of the representative of the people." THE FEDERALIST No. 28, at 224 (Alexander Hamilton)(Benjamin F. Wright ed., 1961).

221. See The Federalist Nos. 45, at 329 (James Madison)(Benjamin F. Wright ed., 1961)(Madison stating

that the power under the proposed Constitution is equivalent to the power of Congress under the old Articles of Confederation).

222. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 794 (1928).

223. See generally Reveley, supra note 85, at 124-43 (presenting a detailed analysis of the ratifiers' treatment of the war and treaty powers).

224. See 2-4 ELLIOT, supra note 85, passim. The lengths of these state records range from the 663 page, highly detailed account from Virginia, to the 10 page, "fragment of facts," account from Maryland. The records differ greatly in quality. Some are so fragmented and disjointed that the meaning is unclear at best. Some of the records are so sparse that they do not make sense. Some of the relevant debates do not come to any closure; therefore, one is left with several of the ratifier's views on a subject, an argument, and nothing further. See 3 Id. at 496-498 (debating the Commander-in-Chief power, but lacking a conclusion for the exchanges by Mason, Lee, Nicholas, and Mason again).

225. WARREN, supra note 222, at 819-20 (over 1,000 delegates attended the various state ratifying conventions).

226. North Carolina ratifiers had significant reservations with the draft and failed to ratify the first time. During the second convention, the "declare war" clause was read without debate. Although the delegates debated the "standing army" proposal and the Commander-in-Chief power. With reference to the Commander-in-Chief power, the ratifiers in North Carolina had a view entirely consistent with the framers. See 4 ELLIOT, supra note 85, at 94-100, 107-8, 114-15.

227. Reveley, supra note 85, at 128.

228. 2 ELLIOT, supra note 85, at 195, 348-50 (Connecticut and New York respectively); 3 Id. at 201, 393-4 (Virginia). Undoubtedly the violation of this maxim was debated in other states as well owing to its popularity, however, the extant records are silent.

229. See 3 ELLIOT, supra note 85, at 172 (Patrick Henry refused to attend the Philadelphia convention because he "smelled a rat" and at the Virginia convention he emphatically derided the clear violation of the sacred maxim by empowering Congress to "declare war and carry it on, and levy your money, as long as you have a shilling to pay"). See also 3 Id. at 378-81 (referencing George Mason's objections; he had voiced the same at Philadelphia and ultimately did not

sign the proposed constitution). See also 1 FARRAND, supra note 86, at 139-40, 144, 146, 338-39.

230. 2 ELLIOT, supra note 85, at 348-49 (Hamilton's defense at the New York convention is only marginally responsive, he notes that it would be difficult to corrupt an entire legislative body in two years time and persuade them to abuse the war and purse powers).

231. See also 2 Id. at 195 (Oliver Ellsworth); 3 Id. at 201 (Governor Randolph); but see 3 Id. at 393-94 (summarizing James Madison's response, he apparently either gets confused or is using the term "sword" in a different way for he implies that the President wields the "sword", although he mentions that "[Congress has] the direction and regulation of land and naval forces").

232. The clearest expositions on the power to "declare war" are found in Pennsylvania, 2 Id. at 528-29, and in New York, 2 Id. at 278 (equates "declaring war" to the same power under the Articles of Confederation to decide for war or peace). The clearest exposition on the " Commander-in-Chief " power is found in North Carolina, 4 Id. at 107 (explaining the President's power in terms of operational control only). See supra note 226.

Framer participation in the debates differed greatly from state to state. At this time, the ratifiers had no other record of the Federal Convention's discussions or debates. In one recorded instance, a framer attempted to recount the Philadelphia debate on the war powers for his state's delegation. His summary was inadequate to convey the framers' thoughts on the matter as reflected in the subsequently published Convention records. See Reveley, supra note 85, at 106-7. Without some recorded, concrete interactions between the framers and ratifiers, it is extremely difficult to evaluate how well their respective understandings matched, and ultimately what the ratifiers' understandings were within a particular state. In many instances the states probably ratified portions of text which they either did not understand or understood imperfectly, vis-à-vis the framers.

233. 1 ELLIOT, supra note 85, at 322-23 (Massachusetts), at 325 (South Carolina), at 325-27 (New Hampshire), at 327 (Virginia), at 327-31 (New York), at 333 (North Carolina, second time), at 333-337 (Rhode Island). The remaining 6 states responded without comment, declaration, reservation, or recommendation.

234. See supra note 84 (definition as used in this thesis); see generally 1 STORY, supra note 94, §§ 405a-407.

235. 1 STORY, supra note 94, § 404.

236. WILLIAM PETERS, A MORE PERFECT UNION 250 (1987).

237. KEYNES, supra note 113, at 101-07.

238. See generally SCHLESINGER, supra note 26, at 26-7, 36-7 (discussing basic facts of the incident).

239. There are at least two conflicting versions of the orders which President Monroe gave to General Jackson. One version, as presented in the text, represents that Monroe was blameless and General Jackson was out of control. A second version represents that Monroe in the secret (never found) "Rhea Letter" authorized General Jackson to invade Spanish Florida. See HARRY AMMON, JAMES MONROE, THE QUEST FOR NATIONAL IDENTITY chs. 23-24 (1971); SAMUEL F. BEMIS, JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY chs. 15-19 (1949).

240. 13 WORLD BOOK James Monroe, supra note 92, at 616 (discussing more facts of the incident).

241. CLARENCE BERDAHL, WAR POWERS OF THE EXECUTIVE IN UNITED STATES 65-67 (1921)(discussing the facts of

incident and the fiery cabinet meeting in which John Q. Adams presented his theory for justification).

242. Cruden, supra note 10, at 45 n.39 (discussing additional facts of the incident and indicating the failure of Congress to repudiate this presidential act, thereby making future administrations less reluctant to interpret their "defensive" war powers in a expansive manner). See also RICHARD W. LEOPOLD, THE GROWTH OF AMERICAN FOREIGN POLICY 97 (1962)

243. Jefferson, who was not a framer, was influential in the early days of the Republic. Philosophically he was a champion of legislative dominance, but as President he found himself in several situations where realities governed his acts more than philosophical purism. See FORREST M. MCDONALD, THE PRESIDENCY OF THOMAS JEFFERSON 60-61 (1976)(discussing President Jefferson's immediate military response to the pasha of Tripoli's declaration of war which Jefferson later apparently thought was beyond his constitutional authority); Id. at 64-68 (recounting the amazing saga of Jefferson's adroit use of threats of war, diplomatic maneuvering, manipulation of Congress, and luck to seal the Louisiana Purchase and secure America against significant Spanish and French presence); see generally HAROLD C. RELYEA, LIBRARY OF CONGRESS, GENERAL RESEARCH

DIVISION, A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES (1974).

Of course some inconsistencies are potentially attributable to changed views. See HENKIN, supra note 10, at 298 n.12; Id. at 297-8, n.10 (referencing an apparent change in Jefferson's views, who was not a framer, but was influential in the early days of the Republic); see supra note 217 (referencing Hamilton's apparent change of views).

244. See, e.g., Myers v. United States, 272 U.S. 52 (1926)(invalidating a legislative enactment requiring Senate concurrence for presidential removals from office based upon contemporaneous constructions furnished during the First Congress in the new republic and James Madison's writings).

245. 1 STORY, supra note 94, § 407.

246. The best record of the constitutional convention, derived from Madison's notes, was not published until 1840. Peters, supra note 236, at 250.

247. Thomas Jefferson, a close friend of Madison, possessed a copy of the Madison's note from the beginning. To the extent that he read and studied these notes, he may have had a better understanding than most. Id. at 249.

248. 1 STORY, supra note 94, § 407.

249. BERDAHL, supra note 241, at 62-3.

250. Professor Glennon establishes six stringent criteria for determining which acts or practices should be considered "custom." They are consistency -- which is a necessary threshold requirement -- numerosity, duration, density, continuity, and normalcy - the latter five are to be balanced together to determine how strong or weak the "custom" should be considered. Glennon, supra note 83, at 129-133. Before a practice can qualify as a "legislative" or "constitutional" fact it must meet these six criteria, i.e., be a "custom." Id. at 133-34. By these stringent criteria very few presidential practices with respect to the war powers can be considered "custom."

251. William Taft was probably referring to this form of use when he stated, "So strong is the influence of custom that it seems almost to amend the Constitution." LOUIS FISHER, PRESIDENT AND CONGRESS 36 (1972).

252. 1 STORY, supra note 94, § 408.

253. HENKIN, supra note 10, at 47, 93. The presidential power to recognize the official governments of other nations apparently stems from President Washington's reception of Citizen Edmond C.

Genet from the newly established Republic of France in 1793. See MCDONALD, supra note 207, at 123-27 (recounting President Washington's reception of Citizen Genet, making the United States the first nation to receive an emissary from the Republic of France).

254. See generally Glennon, supra note 83 (discussing in specific terms this concept of custom, its affects, and proposing a methodology for the principled use of custom in resolving separation of power disputes). Professor Glennon's use of the term "custom" is broader than my definition of constitutional custom, i.e., a pattern of specific practices which substantively fill gaps left in the constitutional text. Professor Glennon suggests that a true "custom" meeting all the stringent criteria of his methodology serves to actually realign constitutional powers between the political branches, unless the constitution expressly prohibits the realignment. Id. at 127-29. Despite the minor definitional differences, his proposed methodology is relevant to this discussion. The key difference is that my development of conceptual models serves to provide a more defined separation of the war powers than is expressly stated in the constitution. Without the use of models Professor Glennon must address a much more ambiguous separation of powers problem using his methodology. For a more recent,

although much less detailed discussion, see also Glennon, supra note 70, at 89-91 (reiterating the problems with citing custom as precedent for constitutional authority in the Desert Storm context).

255. Id. at 134-35.

256. Id. at 135-37.

257. Id. at 137-44.

258. The issue is hypothetical with respect to the constitutional division of the war powers since there have been no adjudications the merits, either prior to or under the WPR. However if the policy of stare decisis means anything, then the probable outcome is as stated in the thesis. See also Id. at 145-46 (citing three Supreme court cases which required longstanding customs to also have their origins in the early republic to be considered "constitutional facts"). But see United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 327-28 (1936) (stating that the court has the ultimate power to determine the constitutionality of a practice, in that case a Congressional practice, notwithstanding its frequency, duration, and origins in the earliest days of the republic).

259. The first Supreme Court case discussing the relevancy of custom was Stuart v. Laird, 5 U.S. (1

Cranch) 299 (1803). The court upheld the constitutionality of a custom "practiced and acquiesced under a period of years." The custom in question was the constitutionality of having Supreme Court justices ride a circuit. The custom apparently began before 1790, when Chief Justice John Jay wrote an "advisory opinion" to President Washington stating that in his opinion the custom was unconstitutional. However the practice continued until it was challenged in the case above. In its opinion the court stated that the custom was "a contemporary interpretation of the most forcible nature ... too strong and obstinate to be shaken or controlled." Id. at 309. Thus the rationale for allowing this mere repeated practice (custom) to fix the "construction" of the constitution appears to be that the framers' intended it. Clearly Washington intended it and thought the practice was constitutional, although the court does not mention his earlier involvement.

260. Id. at 144-46.

261. MCDONALD, supra note 207, at 99.

262. Id. at 145-47 (discussing Washington's initiative in shaping the events and being accused of manipulating Congress and the public by overstating the threat).

263. RELYEA, supra note 243, at 6.

264. But the conceptual models were already beginning to breakdown, as President Washington drew broad outlines for the presidency through his practices and assumed more and more control over the decision-making and policy functions. SOFAER, supra note 112, at 127-29.

265. See HENKIN, supra note 10, at 82-4. Madison would have probably narrowed the constitutional issue even further since the President's act clearly implicated the decisional war powers of Congress. Madison employed the simple argument that the power to "declare war" surely implied the converse: the power to decide not to "declare war." Unfortunately both verbal combatants let their arguments develop into broad discussions concerning which political branch controls determination of America's foreign policy. See generally CORWIN, supra note 33, at 178-181; MCDONALD, supra note 207, at 113-145 (providing a full account of these events set within an historical context).

266. See supra note 217.

267. See generally JACOB K. JAVITS, WHO MAKES WAR 25-35 (1973) (discussing his view of the quasi-war with France); but see BERDAHL, supra note 241, at 80-84 (discussing his somewhat contradictory view of the quasi-war with France).

268. JAVITS, supra note 267, at 30.
269. BERDAHL, supra note 241, at 84.
270. During the "quasi-war" with France, Congress enacted more than twenty laws authorizing the conflict and dealing with captures, HOWARD A. NASH, THE FORGOTTEN WARS, 1798-1805: THE ROLE OF THE U.S. NAVY IN THE QUASI-WAR WITH FRANCE AND THE BARBARY WARS, 1798-1805 at 55-6, 59, 64-7 (1961). BERDAHL, supra note 241, at 83 & n.29, 84; KEYNES, supra note 113, at 37.
271. BERDAHL, supra note 241, at 67.
272. Id. at 67-8 (discussing the strong denouncements by both Jefferson and Madison of this change in policy which could have ultimately led to full war thereby usurping Congress's decisional war powers). See also Id. at 81 (more of Madison's denouncements against Adams usurpations of war powers). John Adams was not a framer in the sense that he did not attend the Federal Convention. QUINN, supra note 165, at 110.
273. BERDAHL, supra note 241, at 69.
274. In December 1801, President Jefferson addressed Congress and stated that his deployment of American naval forces against the Barbary pirates for defensive purposes was beyond his independent constitutional authority. Then he deferentially requested congressional authority to conduct both an offensive

and defensive limited war. Congress responded with a broad grant of authority. By some accounts Jefferson was already prosecuting full war, and this address was disingenuous. See TURNER, supra note 10, at 60-61. Hamilton apparently thought it was genuine for he attacked Jefferson's limited view of the President's war powers. BERDAHL, supra note 241, at 63-64. Cf. WRIGHT, supra note 81, § 209.

275. Compare JAVITS, supra note 267, at 37-38, 40-41, 46-49 and TURNER, supra note 10, at 59-60 with Biden & Ritch, supra note 32, at 375-76. See also BERDAHL, supra note 241, at 63-64; KEYNES, supra note 113, at 38-39 (giving an apparently neutral account of Jefferson's handling of the Barbary wars); See generally Id. at 191 n.30-33 (citing numerous other sources).

276. Today's Commander-in-Chief 's would probably argue that the military action was justified: (1) to protect American sailors' lives (2) to enforce the law pursuant to the "take care" clause, since in 1798, Congress had enacted a law to protect trade using naval force if necessary. TURNER, supra note 10, at 59-60. It is very difficult to understand Jefferson's actions with respect to this incident. On one hand he seems to manipulate the informational flows to Congress so that he can prosecute the war as he desires, on the other

hand he defers to Congress's war powers and chooses to ignore simple legal arguments which could have justified even his secretive acts.

277. HENKIN, supra note 10, at 53. See also KEYNES, supra note 113, at 39 (discussing the land campaign by a quasi-U.S. force which the Jefferson administration apparently knew about and approved; this ground force's advance against Tripoli ultimately ended the conflict). See generally MCDONALD, supra note 243, at 60-61, 90-100; WRIGHT, supra note 81, §§ 209-10 (displaying how contemporaneous construction is abused and how practices progressively build and enlarge upon one another far beyond the scope of the original practice).

278. See Biden & Ritch, supra note 32, at 376; 13 WORLD BOOK Madison, James, supra note 92, at 31-2. See also J. MALCOM SMITH & STEPHEN JURIKA, JR., THE PRESIDENT & NATIONAL SECURITY 7-8 (1972).

279. James Madison, War Address to Congress (June 1, 1812), in 2 MESSAGES AND PAPERS OF THE PRESIDENTS 484-90 (James D. Richardson ed., 1897)

280. For example, Civil War cases are nearly a sui generis, as are the presidential practices which gave rise to those cases. However scholars often indiscriminately cite such precedents to support their positions. See supra note 135. Wald, supra note 63,

at 1413 & n.30 (discussing general abuses in the use of judicial opinions for support).

281. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *Talbot v. Seeman*, 4 U.S. (4 Dall.) 34 (1800).

282. Bas, 4 U.S. at 43.

283. Militia Act, ch. 36, 1 Stat. 424 (1795)(authorizing the president to call forth the militia whenever "the United States shall be invaded, or be in imminent danger of invasion").

284. 25 U.S. (12 Wheat.) 19 (1827).

285. Id. at 29-30 (reiterating that the delegated power was not unlimited, but was confined to the exigencies specified by Congress).

286. 12 U.S. (8 Cranch) 110 (1814).

287. But cf. HENKIN, supra note 10, at 96-97 (discussing the narrow reading of the case [seizure of a private foreign vessel by a local United States Attorney merely claiming the mantle of Executive authority is unconstitutional] and intimating that no court would ever follow the broader holding of this decision [the Commander-in-Chief lacks authority to confiscate a private foreign vessel during "declared war" unless Congress authorizes it] in light of

intervening Civil War precedents and modern day realities).

288. See Brown, 12 U.S. at 129, 144-45 (Story, J., dissenting) (Story's theory is unclear, i.e., whether Congress by declaring war implicitly granted this power to the Commander-in-Chief, or whether during "declared war" the Commander-in-Chief clause empowers the President to seize enemy property. Story admitted that Congress could have expressly limited or denied this power). The Commander-in-Chief ought to be given broad discretion to prosecute war successfully by the means of his choosing within the parameters set by Congress. See infra pp. 113 and accompanying notes.

289. *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D. N.Y. 1860)(No. 4,186)(the opinion of the court was delivered by Samuel Nelson who later became Chief Justice of the U.S. Supreme Court).

290. See generally HENKIN, supra note 10, at 54. This presidential power is so important because of the frequency with which it is relied upon by presidents; JAMES G. ROGERS, *WORLD POLICING AND THE CONSTITUTION* 92-123 (1945)(cataloging 150 presidential uses of force abroad with the great majority for the protection of Americans and their property).

291. Durand, 8 F. Cas. at 112. See also In re Neagle, 135 U.S. 1 (1890); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873)(holding that protection abroad was a "privilege and immunity" of American citizenship).

292. Wald, supra note 63, at 1412 n.24. See generally CORWIN, supra note 33, at 194-204; Id. at 199 (construing Jefferson's independent decision to use "defensive" force against the Barbary pirates to protect Americans and their vessels as the earliest example of this practice).

293. Cruden, supra note 10, at 78-79 & n. 191; Ely, supra note 49, at 1393 & n. 46; TURNER, supra note 10, at 109-10 (arguing that this omission from §1541(c) of the WPR was an error).

294. See supra note 83.

295. A phrase coined by President Bush in address from the Oval Office 8 August 1990, 26 WEEKLY COMP. PRES. DOC. 1216-17 (Aug. 8, 1990).

296. Individually there was some dissent. For example, fifty-four Congressmen (53 members of the House; 1 Senator) filed suit asking the court to issue an injunction ordering the President not to use force against Iraq without prior Congressional approval.

Dellums v. Bush, 752 F.Supp. 1141 (D.D.C. 1990).

297. THE FEDERALIST No. 48, at 343-45, 347 (James Madison)(Benjamin F. Wright ed., 1961)

298. Youngstown, 343 U.S. at 637 (Jackson, J., concurring)(Jackson states, "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."). See Biden & Ritch, supra note 32, at 394-96; Glennon, supra note 61, at 575-76. Contra War Power Legislation: Hearings Before the Comm. on Foreign Relations, United States Senate on S. 731 S.J. Res. 18 and S.J. Res. 59, 92d Cong., 1st Sess. 468-470 (1971)(statement of Professor John N. Moore). But see TURNER, supra note 10, at 25-30; Eugene V. Rostow, Hard Cases Make Bad Law, 50 TEX. L. REV. 833, 896 (1972)(arguing that the presidential war powers are derived directly from the Constitution and therefore are not subject to congressional derogation by enactments are otherwise). See generally Wald, supra note 63, 1411-1414 (for a simple, well documented discussion of the two main competing approaches).

299. The framers use of the word "concurrent" did not necessarily refer to undivided or overlapping power.

Concurrent - (1) meeting; united;  
accompanying; acting in conjunction; agreeing  
in the same act; contributing to the same

event or effect operating with (2) conjoined;  
associate; concomitant (3) joint equal;  
existing together and operating on the same  
objects, The courts of the United States, and  
those of the States have, in some cases,  
concurrent jurisdiction.

1 AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 44  
(1828)

300. See Little v. Barreme, 6 U.S. (2 Cranch) 170  
(1804)(seizure of a French ship by a U.S. naval vessel  
based upon presidential authorization was illegal  
because Congress had "spoken" through legislation and  
the president's authority was strictly circumscribed by  
that law; Chief Justice Marshall expressly did not  
interpret the president's independent war powers, but  
did note that in the absence of legislation the  
president may have been able to order the seizure based  
upon his own authority). This early case is the  
theoretical and precedential basis for Justice  
Jackson's proposed three-part analysis in Youngstown,  
343 U.S. at 637. Jackson's methodology was dicta, but  
the Supreme Court apparently adopted it in Dames &  
Moore v. Reagan, 453 U.S. 654, 680 (1981). Nor is  
Congress without the constitutional theory to justify

broad legislation in support of their war powers. See HENKIN, supra note 10, at 71-72 (arguing that the power to "declare war" implies the power to "wage war and supports what is necessary and proper to wage war successfully ... [the] power to prepare for war and to act to deter and prevent war ... the power to deal with the aftermath and the consequences of war"); Id. at 81 (arguing that based upon the "declare war" clause Congress can decide the level of war by bill, resolution, appropriation act, etc.); Id. at 72 (arguing that Congressional power is virtually limitless, "[t]he Supreme Court has never declared any limit to the war powers of Congress during war or peace or even intimated where such limits might lie"). See also 1 STORY, supra note 94, §394 ("[I]f the usurpation should be by the president, an adequate check may be generally found, not only in the elective franchise, but also in the controlling power of congress, in its legislative or impeaching capacity ...").

301. See supra pp. 71-73 and accompanying notes (discussing that not every practice stands up under judicial review as a "constitutional fact" and if the practice is not such a fact it bows to subsequent legislative acts).

302. See generally HENKIN, supra note 10, at 105 (arguing that in arenas like the war powers,

"[C]oncurrent power often begets a race for initiative and the President will usually 'get there first'.")).

303. See supra pp. 72-73 and accompanying notes.

Under Justice Jackson's methodology, if a war powers case is ever adjudicated on its merits, Congress has "spoken" through the WPR, and a presidential use of force contrary to the WPR should yield in all cases except where the court finds that the presidential practice is a "constitutional fact." For example, the Commander-in-Chief's authority to use force to protect Americans and their property abroad is probably a "constitutional fact."

304. But see Forrest McDonald, Forward to THE CONSTITUTION AND THE AMERICAN PRESIDENCY at ix-x (Martin L. Fausold & Alan Shank eds., 1991)(arguing that a pervasive theme in the works collected is that the bifurcated presidency, which the framers created, does not work well; the two divisions being the "Fast Track" (powers and functions which the executive unilaterally controls) and the "Slow Track" (powers and functions which the executive shares with one or both houses of Congress); also arguing, that rather than by genius and design, this dysfunctional bifurcation is more the product of slipshod craftsmanship and a desire to end the Federal Convention).

305. 2 Corinthians 6:14 (King James).

306. KEYNES, supra note 113, at 52; See THE FEDERALIST No. 70, at 451-52 (Alexander Hamilton)(Benjamin F. Wright ed., 1961); Id. No. 74, at 473 (the ability to direct common strength); Id. No. 64, at 423 (John Jay)(secrecy and despatch); King & Leavens, supra note 147, at 90-92 (ability to profitably process vast amounts of information and make rational decisions); CORWIN, supra note 33, at 225 (always in session, swift, secretive, in command of the widest information).

307. JARED SPARKS, THE LIFE AND WRITINGS OF WASHINGTON 422 (1839)(discussing the reality that ever since Washington's administration, responsibility for leadership and initiative during crisis settings has devolved upon the chief executive). See generally REXFORD TUGWELL, THE ENLARGEMENT OF THE PRESIDENCY (1977).

308. HENKIN, supra note 10, at 274; POWERS OF CONGRESS 88-99 (R. Diamond ed., 1976); EAGLETON, supra note 23, at 146.

309. Biden & Ritch, supra note 32, at 374-86 (tracing two centuries of war powers practices).

310. In general, consideration of war powers

legislation in any form has been a "Cold War" phenomena, see supra p.4 and accompanying note.

311. Glennon, supra note 61, at 581 (discussing the inability of Congress to rectify any of the identified failures in the WPR because of the lack of a constitutional war powers crisis).

312. EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 171-82 (1947)(arguing that legislators are logically less concerned with the "non-urgent" foreign relation topics such as the war powers).

313. Cf. George S. Swan, Presidential Undeclared Warmaking and Functionalist Theory: Dellums v. Bush and Operation Dessert Shield and Dessert Storm, 22 CAL. W. INT'L L.J. 75, 116 (1991).

314. LOUIS W. KOENIG, THE CHIEF EXECUTIVE 10 (3d ed. 1975); Cf. TURNER, supra note 10, at 121-128 (arguing that during 16 years of existence the WPR has often been used by Congress as a tool of political expediency, that there is very little genuine Congressional interest in rectifying constitutional imbalances).

315. See THE FEDERALIST No. 85, at 544-47 (Alexander Hamilton)(Benjamin F. Wright ed., 1961).

316. Youngstown, 343 U.S. at 654.

317. Reveley, supra note 85, at 84-5, 146-47.

318. But see THE FEDERALIST No. 11, at 138, 141-42 (Alexander Hamilton)(Benjamin F. Wright, ed., 1961)(arguing that a strong navy is necessary for America to project military power in the protection of her global commerce; alluding to "the regions of futurity" when America might dominate the Americas). Id. No. 24, at 208; Id. No. 34, at 205. Perhaps other framers also shared Hamilton's vision. See supra note 77.

319. DEPARTMENT OF DEFENSE, ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS 3 (1991) [hereinafter DOD ANNUAL REPORT] (discussing the proliferation of high technology weapons throughout even the Third World, as well as the large conventional forces which several countries possess).

320. Id. at 133 (discussing the need to move quickly to meet unpredictable, potent threats).

321. Id. at 21, 81 (discussing the high priority on maintaining and improving strategic mobility).

322. See, e.g., Dep't of Army, Field Manual 27-100, Legal Operations, at 26, 29 (3 Sep. 1991); Dep't of Army, Field Manual 100-5, Operations, at 1 (5 May 1986)(referencing the "spectrum of conflict" which is

conceptually identical to an "operational continuum").

323. The framers were probably familiar with the concepts of undeclared war (limited or "imperfect" war) and declared war ("perfect" war). Thus they probably understood that war could be waged at varying levels of magnitude. But limited war-making capabilities probably narrowed their thinking as far as the nature of warfare to conventional forms. See supra notes 150.

324. BARRY M. BLECHMAN & STEPHEN S. KAPLAN, THE BROOKINGS INSTITUTION, FORCE WITHOUT WAR: UNITED STATES ARMED FORCES AS A POLITICAL INSTRUMENT (1978)(cataloging 200+ lesser uses of force between 1798 and 1978).

325. U.S. CONST. pmbl.

326. Cf. Gerald R. Ford, State of the Union Message, Address Before Congress (January 19, 1976), in PHILIP VAN SLYCK, STRATEGIES FOR THE 1980'S 37 (1981)("a strong defensive posture gives weight to ... our views in international negotiations; it assures the vigor of our alliances; and it sustains our efforts to promote settlements of international conflict"). See generally WRIGHT, supra note 81, §§ 214-220 (cataloging seven measures for directing force against another nation for foreign affairs purposes; arguing that the three major

categories are diplomatic pressure -- controlled by the executive, economic pressure -- controlled by Congress, and military force the control of which will depend upon the measure employed); ROGERS, supra note 290, at 21; DOD ANNUAL REPORT, supra note 319, at 4, 6-7 (announcing three defense priorities with clear foreign relations implications: collective security alliances, low intensity conflict resolution, peacetime engagement, i.e., nation building).

327. Isaiah 2:4 (King James).

328. See generally HENKIN, supra note 10, at 279 (citing examples of organizational reforms which Congress has implemented to meet their decisional foreign relations challenges and indirectly their decisional war powers responsibilities).

329. JAVITS, supra note 267, at 242-247; Hollander, supra note 130, at 71 (addressing the concept of collective security arrangements--bilateral and global, and deployment of "trigger forces" worldwide; such modern day national security arrangements replace the decisional portion of the war powers in certain cases).

330. See HENKIN, supra note 10, at 100-101 (arguing that the demarcation in this area is "elusive, sometimes illusory," but that Congress might be able to

"veto" the situation and order extraction of the forces); Id. at 344 n.23 (Hamilton believed that Congress could "veto" and thereby contain the President's initiative).

331. BERDAHL, supra note 241, at 53-57.

332. There is another type that advocates acceptance of the status quo: the pragmatic-skeptic like Representative Dante Fascell who believes that the WPR is "the most [Congress] can hope for." Biden & Ritch, supra note 32, at 393.

333. See generally Glennon, supra note 70, at 112-124 (summarizing and evaluating the three "jurisprudential tools ordinarily used to resolve other constitutional controversies [as applied to separation of power disputes]"; categorizing the three approaches as the textual (interpretivist) approach, the intentionalist approach, and the adaptivist approach); evaluating the strengths and weaknesses of each approach briefly).

334. A pure intentionalist approach does not recognize the relevance of subsequent practice or custom which I have done, see supra pp. 96-97. See Glennon, supra note 83, at 119.

335. See supra note 82.

336. See supra pp. 84.

337. See supra pp. 85-87 and accompanying notes.
338. RELYEA, supra note 243, at 1. Locke also believed that the powers of war and peace were "federative" and that the executive should exercise them. See supra note 114.
339. See supra note 3.
340. DOD ANNUAL REPORT, supra note 319, at 7, 43-44.
341. THE FEDERALIST Nos. 47, 48 (James Madison).
342. Cf. FRANCIS D. WORMUTH AND EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW (1986)(arguing that the framers wanted a decision as important and potentially fateful as whether to prosecute war to be left in the hands of many, modernly the war powers lie with the President who is but one man and is subject to human error and other frailties which the framers sought to guard against). Although the President may be the ultimate decision-maker, this view somewhat discounts the role which the executive's national security advisors play. There is group decision-making, but Congress is not always included.
343. Richardson, supra note 78, at 738.
344. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 136 (2d ed. 1983)(explaining that the integrated system of

"checks and balances" was intended to ensure the political independence of the three branches, thereby maintaining the balance of powers originally established).

345. A logical corollary to the system of "checks and balances" is that to get anything accomplished the branches must cooperate and accommodate one another.

See HENKIN, supra note 10, at 108-09, 279; KEYNES, supra note 113, at 16. Cf. Id. at 34-35, 91.

346. TURNER, supra note 10, at 33.

347. See TURNER, supra note 10, at 29-33 (discussing the string of legislative solutions to the Vietnam War --barring use of appropriated funds for introduction of ground troops into Laos or Thailand, the Cooper-Church Amendment which generally cutoff funds for the war in Indochina after 15 August 1973, and after withdrawal of American ground forces the progressive curtailment of aid requests); Moore, supra note 63, at 142-43.

348. Glennon, supra note 70, at 100. Professor Glennon has long advocated use of the purse power to enforce the WPR. See infra note 349. The power is plenary, but not unlimited. Louis Fisher, How Tightly Can Congress Draw the Purse Strings?, 83 AM. J. INT'L L. 758, 762-63 (1989).

349. Fisher, supra note 348, at 758; King & Leavens, supra note 147, at 66-68; Michael J. Glennon, Strengthening the War Powers Resolution: The Case for Purse Strings Restrictions, 60 MINN. L. REV. 1, 28-38 (1975) (discussing methods of strengthening the WPR with the purse strings). Contra TURNER, supra note 10, at 93-95; Hollander, supra note 130, at 60-63. Cf. Robbins, supra note 69, at 179-181; Orrin Hatch, What the Constitution Means by the Executive Power, 43 U. MIAMI L. REV. 197, 202-03 (1988) (discussing how Congress's use of the purse can lead to inconsistent and ambiguous foreign policies which are detrimental to national security interests and foreign relations).
350. See, e.g., Fisher, supra note 348, at 764.
351. King & Leavens, supra note 147, at 68 n.61 (noting that despite a presidential veto, and where there is no hope of an override, Congress's position can provide enough political pressure to bring the President to a compromised position).
352. See generally BOYKIN, supra note , at 306-352.
353. See HENKIN, supra note 10, at 86.
354. Hollander, supra note 130, at 73-74.
355. See generally HENKIN, supra note 10, at 208-216 (discussing judicial review as applied to foreign affairs).

356. See supra pp. 80-83 and accompanying notes.
357. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).
358. See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 295-97 (1980)(arguing that courts should avoid adjudication because lack institutional capability). Contra Michael J. Glennon, Foreign Affairs and the Political Question Doctrine, 83 AM. J. INT'L L. 814 (1989)(arguing that by abdicating judicial review role in separation of power cases the doctrine can lead to results which are opposite its stated goals). See generally 1 STORY, supra note 94, § 374 (discussing origins of the political question doctrine); Michael E. Tigar, Judicial Power, the "Political Question Doctrine," and Foreign Relations, 17 UCLA L. REV. 1135 (1970); Louis Henkin, Is There a "Political Question" Doctrine?, 85 YALE L. J. 597 (1976).
359. See supra note 80; KEYNES, supra note 113, at 101-107 (discussing the Civil War cases in detail).
360. Wald, supra note 63, at 1413.
361. But by picking and choosing the right cases one can support almost any view of the war powers. One commentator described this technique: "[c]ollecting and summarizing diverse, limited and sometimes petty

constitutional and statutory authorities into undifferentiated, all-inclusive powers." Gerhard Casper, Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model, 43 U. CHI. L. REV. 463, 477 (1976).

362. See, e.g., INS v. Chadha, 462 U.S. 919 (1983).

363. Today courts are using a full range of "case or controversy" and prudential considerations to avoid adjudicating war powers cases. KEYNES, supra note 113, at 170. See Dellums, 752 F. Supp. at 1152; Ange v. Bush, 752 F.Supp. 509, 512, 515 (D.D.C. 1990); Pietsch v. Bush, 755 F.Supp. 62, 68 (E.D.N.Y. 1991) (The most recent cases from Operation Desert Shield and Storm were avoided based upon ripeness, political question/ripeness, and lack of standing respectively).

364. See supra p. 18.

365. TURNER, supra note 10, at 121-27 (citing and analyzing four cases in which Congressmen have used the WPR for politics).

366. HENKIN, supra note 10, at 103.

367. TURNER, supra note 10, at 129-33, 134-46 (including details of the events leading up to the Beirut, Lebanon disaster and how the WPR was directly involved).

368. DOD ANNUAL REPORT, supra note 319, at 3.

369. Id. at 7 (stating, "[R]egional conflict has replaced global war as the major focus of defense planning.").

370. MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR 192, 195, 224 (1991).

371. Arthur M. Schlesinger, Jr., The Constitution and Presidential Leadership, 47 MD. L. REV. 54, 72-73 (1987) (warning against what he terms "messianic foreign policy" where the United States begins to perceive its global mission as savior of all of "fallen humanity"; arguing that our 18th Century Constitution will be overmatched by such a misguided foreign policy). Cf. DOD ANNUAL REPORT, supra note 319, at 33 (declaring specifically that it is not America's intention to seek to militarily enforce a Pax Americana).

But will America become a global policeman by way of the United Nations' collective security mechanism? Operation Desert Storm may portend the future. There are apparently two somewhat conflicting views over the status of providing American forces to the United Nations' Security Council for use in operations like Korea and Desert Storm. Compare TURNER, supra note 10, at 89-92 (forces furnished pursuant to article 43 of

the Charter, which has never been implemented by domestic law, need not receive congressional approval by a declaration of war or otherwise) with Glennon, supra note 70, at 100-01 (forces furnished pursuant to article 43 of the Charter must be by written agreement with the Security Council and approved by Congress, as specified in the U.N. Participation Act).

372. HENKIN, supra note 10, at 279. (For non-latin scholars this essentially means ways of operating together).

373. See generally TURNER, supra note , at 161-68; Biden & Ritch, supra note , at 410-12; W. TAYLOR REVELEY, III, WAR POWERS OF THE PRESIDENT AND CONGRESS 49 (1981)(describing cooperation as the constitutional system's "iron demand on the President and Congress"); WRIGHT, supra note , § 266 (quoting Lord John Russell's pointed insight "[P]olitical constitutions in which different bodies share the supreme power are only enabled to exist by the forbearance of those among whom this power is distributed.").

374. See supra pp. 10-21.

375. See supra pp. 84.

376. Of course this is only speaking from a theoretical standpoint since the WPR has never functioned properly, see supra pp. 18-21.

377. See supra pp. 84-85, 91-95.

378. See supra pp. 96-104.

379. Some commentators have argued that legislation patterned after the WPR is not the answer. Cf.

Richardson, supra note 78, at 738-739; Leigh, supra note 207 (manuscript unnumbered)(suggesting that each new administration make an informal agreement with Congress concerning consultation and reporting, the procedures to be followed, etc. and then have Congress enact this as a non-binding, non-precedent setting, concurrent resolution). See generally JOHN R. VILE, REWRITING THE UNITED STATES CONSTITUTION 5, 163-64 (1991)(discussing a related topic, the utility of extra-constitutional changes and reforms; arguing that formal amendment of the Constitution has proven too difficult and that major changes to the congressional committee system, congresses' rules and procedures, the system of presidential staffing, and the President's cabinet, all have and can be modified to address issues such as the balance of power between the executive and legislative branches).

380. Youngstown, 343 U.S. at 610-611 (Frankfurter, J.)  
Justice Frankfurter's famous comment about how custom supplies meaning, if not substance, to the Constitution:

The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive power" vested in the President by § 1 of Art. II.

381. Pious, supra note 159, at 196.

382. See supra p. 83 and accompanying notes; see supra note 135.

383. See supra pp. 71-73 and accompanying notes.

384. A few early court decisions interpreted the Commander-in-Chief power very restrictively. The first example is found in *Brown v. United States*, a Supreme Court case previously discussed. See supra pp. 81-82.

See also *Fleming v. Page*, 50 U.S. (9 How.) 603

(1850)(construing the Commander-in-Chief clause very narrowly to comprise "purely military" functions such as command of the forces in the field); CORWIN, supra note 33, at 228-29 (discussing *Fleming* and noting that the Commander-in-Chief clause did not expand in its meaning until the Civil War). This explains *Brown v. United States* also. The Commander-in-Chief's prosecution of modern warfare would be unduly restricted if these judicial interpretations were enforced.

In the ubiquitous Youngstown Sheet and Tube Company case, one troubling aspect is part of Justice Black's opinion which apparently limits the Commander-in-Chief's broad powers to the "theater of war." Furthermore, he defines the "theater of war" using a simple geographic analysis. Although he admits that

what constitutes a "theater of war" is an expanding concept.

There are many differing views concerning the true import of Youngstown Steel and Tube Company. The case clearly has many interesting facets. Some view it very narrowly as a case which circumscribes the Commander-in-Chief power. Some view it as a more fundamental limit on the chief executive's emergency powers. Some view it broadly as it pertains to Justice Jackson's fluctuating powers and his tripartite analysis. Since steel is such an essential component of military supply, whether or not Congress had spoken through legislation, the court should have probably deferred to the presidential determination that a military emergency existed (unless the existing conditions clearly contradicted such a finding). In view of the criticality of logistics to successful prosecution of war, Justice Black may have unduly restricted the President's Commander-in-Chief and/or emergency powers. See generally MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE--THE LIMITS ON PRESIDENTIAL POWER (1977); HENKIN, supra note 10, at 307 n.45.

385. See supra p. 99-100 and accompanying notes.

386. See TURNER, supra note 10, at 29-33; Moore, supra note 63, at 142-43.

387. Apparently the consultation with Congress prior to the initial deployment had been good and the Commander-in-Chief had sent formal reports to both houses, although they did not fully comply with the WPR requirements. TURNER, supra note 10, at 138.

388. Id. at 141-44.

389. Congressional leaders have proposed amendments to the WPR, or replacements to the WPR, which incorporate procedures to clear the way for judicial review of the legislation. If these follow on amendments, or laws, are ever adopted, the consequent judicial showdown could very well result in devastation for the President's war powers given his constitutionally weak position vis-a-vis Congress. See supra pp. 72-73 and accompanying notes; see supra note 303.

390. Professor Henkin alludes to this concept while commenting on foreign policy when he states:

Congress's part cannot be equal to the President's but the constitutional conception ... suggest that the degree and kind of Congressional participation should increase as the means of foreign policy begin to include uses of force and to approach a national commitment to war, and as the cost

of policy begins to loom large in the competition for national resources.

HENKIN, supra note 10, at 279-80.

Many commentators have proposed various ways to achieve less than full Congressional participation. See generally Robbins, supra note 69, at 182 (proposing a joint select war powers committee); Moore, supra note 63, at 152-53. Cf. Biden & Ritch, supra note 32, at 402 (mentioning the "consultative group" proposed in the Byrd-Warner bill). Contra TURNER, supra note 10, at 149-50 (discussing problems with the concept of a consultative group taken from the legislative branch).

391.           THREE VARIABLES

No Congressional	Full
Involvement	Congressional
	Involvement

#### DEGREE OF URGENCY

Operational	_____	Peacetime
Emergencies		Contingencies
(increasing,		(static threat)
uncertain threat)		

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 -----  
 Consultative Group/ Full  
 Limited Involvement Congressional  
 Involvement Involvement

DEGREE OF RISK  
 (COSTS)

Limited \_\_\_\_\_ Wide-scale  
 Operations Operations  
 (LIC (Mid/High intensity)  
 nation building)

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Consultative Group/ Full Congressional  
 Limited Involvement Involvement

PURPOSES FOR THE USE OF FORCE

(BENEFITS)

National \_\_\_\_\_ Global  
 Survival Collective Security

392. LORELL & KELLEY, supra note 10, at 84-85. These  
 two aspects are often related since the total

casualties may depend upon the duration of the operation.

393. See generally JOSEPH FRANKEL, NATIONAL INTEREST (1970) (arguing that the term is vague and undefined term; that there is no commonly accepted criteria by which to define the term). Those national interests relating to national survival are the "vital" or "core" interests, lesser interests are not well defined. Id. at 73.

394. See supra p. 103.

395. But see HENKIN, supra note 10, at 107-08 (arguing that Congress can clearly terminate the war it has expressly or implicitly authorized; arguing Congress can "control the conduct of war" and make decisions about the geographic scope of war, perhaps whether to release nuclear weapons, etc.). Id. at 351 n.48, 351-52 n.49. Cf. KEYNES, supra note 113, at 165.

396. TURNER, supra note 10, at 59-60 (citing Jonathan Dayton, our youngest framer, whose understanding was that the Commander-in-Chief clause afforded the President maximum operational discretion during military operations, independent of whether Congress used its decisional war powers, and that specific legislative direction on such matters would set a

"dangerous precedent;" the troubling language was stricken from the proposed enactment before passage).

397. See WRIGHT, supra note 81, § 249 (presenting view of the constitutional understanding when executive-legislative cooperation is necessary for an act: "the advice of that ... [other branch] ... ought to be sought before the action is taken, but where such action has already been taken the ... [other branch] ... ought to perform the necessary acts.>"). Although the executive branch should be free to exercise its operational war powers, Congress's response to suspected abuse or improprieties should be its broad investigatory powers, not interference with operations. See supra note 21.

398. See supra note 149.

399. There are numerous proponents for amending the WPR (or any legislative alternative) to ensure judicial review. See Glennon, supra note 70, at 99; Glennon, supra note 61, at 578-80; Michael Ratner & David Cole, The Force of Law: Judicial Enforcement of the War Powers Resolution, 17 LOY. L.A.L. REV. 715, 766 (concluding that in a impasse, only courts can effectuate the resolution); Biden & Ritch, supra note 32, at 408-410.

The respective arguments are summarized in KEYNES, supra note 113, at 62-67. The analysis shows that there are several distinct categories of legal issues surrounding the war powers. The most important constitutional issues involving the fundamental separation of power are unlikely to be resolved by the courts due to practical considerations. Notwithstanding the conceptual war powers model present here, courts historically use judicial avoidance mechanisms to abdicate their judicial review function. Id. at 91-29, 113. Even Justice Jackson recognized that "any actual test of power is likely to depend on the imperative of events and contemporary imponderables rather than abstract theories of law," Youngstown, 343 U.S. at 637 (Jackson, J., concurring). Resolution of these constitutional issues would probably conclude the matter, but there is also great danger since if judicial review is actually sought and obtained since the "imponderable" may dictate the decision. If history is instructive bad law often results from military crisis, e.g., Civil War cases and more recently Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

The category of war power issue addressed by most commentators involves construction and implementation of the WPR itself. Amendments could create a judicially enforceable WPR, but the dangers are that a decision could effectively make foreign policy. See KEYNES, supra note 113, at 170-72. Limited judicial review for the sole purpose of forcing joint decision-making is not problematic. Cf. Ely, supra note 49, at 1406-1417 (discussing how to get around the various tools of judicial abstention, but suggesting judicial review only for the limited purpose of "triggering" the WPR, thereby returning the ultimate issue resolution to political branches).

400. E.g., Conyers v. Reagan, 578 F.Supp. 324, 327 (D.D.C. 1984).

401. Youngstown, 343 U.S. at 635 (Jackson, J., concurring) ("And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.")

402. See generally Leigh, supra note 207 (manuscript unnumbered; WRIGHT, supra note 81, § 244, 266 (referencing the need for effective constitutional understandings in the area of foreign affairs especially on separation of powers issues)).

403. HENKIN, supra note 10, at 34.

404. Youngstown, 343 U.S. at 634.

405. See supra note 26.

Express and ancillary grants of the war powers:

#### EXPRESS GRANTS

##### Congress (Article I)

8, cl. 11. [Congress shall have the power ...] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

##### Executive (Article II)

2, cl. 1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;

#### ANCILLARY GRANTS

8, cl. 12. To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

3. He shall ... Commission all the Officers of the United States.

8, cl. 13. To provide and maintain a Navy;

8, cl. 14. To make Rules for the Government and Regulation of the land and naval Forces;

8, cl. 15. To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

8, cl. 16. To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States ... [state author-

10, cl. 1. No State shall ... grant Letters of Marque and Reprisal;

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*Appendix A*